SUPREME COURT, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

ANTHONY CICORIA,

Petitioner,

v.

PATRICIA K. CUSHWA,
Chairperson, Maryland Parole Commission,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES K. GREEN, ESQ.
Counsel of Record
JAMES K. GREEN, P.A.
One Clearlake Centre, Suite 1602
250 Australian Avenue South
West Palm Beach, Florida 33401
(561) 659-2029

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

WHETHER THE MARYLAND COURTS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS BY JUDICIALLY CREATING A NEW CRIME THROUGH A NOVEL INTERPRETATION OF A CAMPAIGN FINANCE STATUTE WHICH THEY RECOGNIZED WAS SILENT ON THE ISSUE, AND BY FAILING TO APPLY THE RULE OF LENITY, IN CONFLICT WITH SECOND CIRCUIT PRECEDENT.

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Anthony Cicoria ("Petitioner" or "Cicoria") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 30, 2000, which per curiam affirmed the order and memorandum opinion of the United States District Court For the District of Maryland denying Cicoria's federal habeas corpus petition.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit that gives rise to this Petition is *Cicoria v. Cushwa*, No. 99-7688, CA-99-2364-S, March 30, 2000 (App. 1). The Memorandum Opinion of the United States District Court for the District of Maryland, Civil No. S 99-2364, November 16, 1999 is set forth in App. 5. The Maryland Court of Appeals opinion is *Cicoria v. State of Maryland*, 332 Md. 21, 629 A.2d 742 (Ct.App.Md. 1993) (App. 12). The Maryland Special Court of Appeals opinion is *Cicoria v. State of Maryland*, 89 Md.App. 403, 598 A.2d 771 (Ct.Sp.App.Md. 1991) (App. 37).

JURISDICTION

On November 16, 1999, the United States District Court for the District of Maryland issued a Memorandum Opinion and Order denying Cicoria's petition for federal habeas corpus. On December 14, 1999 the United States

District Court for the District of Maryland denied Cicoria's timely filed Motion to Issue a Certificate of Appealability. Cicoria timely filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit, which per curiam affirmed on March 30, 2000 the District Court's Memorandum Opinion and Order. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the Fourth Circuit's judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Maryland Theft Statute, Md. Ann. Code art. 27, § 340, *et seq.* (App. 68)

Maryland Fair Election Practices Act, Md. Ann. Code, art. 33, § 1-1, *et seq.* (App. 84)

STATEMENT OF THE CASE

In 1990, the State of Maryland charged Cicoria, a county councilman, with violating the Maryland Theft Statute, Md. Ann. Code art. 27, § 340 *et seq.* The indictment alleged that Cicoria stole funds from his authorized campaign political committee.

A Prince George's County Circuit Court jury convicted Cicoria of one count of theft, one count of conspiracy to commit theft, and three counts of tax evasion on October 30, 1990. The Maryland trial court sentenced Cicoria to concurrent terms of ten years, suspended five

years on each count, and directed that Cicoria serve five years of probation upon his release. On appeal, the Maryland Court of Special Appeals suspended all but 275 days of Cicoria's sentence (time served). *Cicoria v. State of Maryland*, 89 Md.App. 403, 598 A.2d 771 (Ct.Sp.App.Md. 1991).

Cicoria then obtained certiorari in the Court of Appeals of Maryland on the issue of whether, under the Maryland Theft Statute, a candidate for public office may be convicted of theft and conspiracy to commit theft when the funds alleged to have been stolen and which are the subject of the conspiracy are those contributed to the candidate's campaign political committee. *Cicoria v. State of Maryland*, 332 Md. 21, 629 A.2d 742 (Ct.App.Md. 1993).

Cicoria contended that although misuse of campaign funds may have violated Maryland's Fair Election Practices Act, Md. Ann. Code art. 33 § 1-1 *et seq.*, it did not constitute the crime of theft because a person cannot steal from himself. Cicoria argued also that because the conduct was not clearly prohibited by statute, he was not on notice.

In a lengthy opinion, the Maryland Court of Appeals conceded that "no where in the Election Code, and, in particular, the Fair Election Practices Act, is the issue critical to the resolution of this case expressly addressed: who is to be considered the owner of campaign contributions?" *Cicoria*, 629 A.2d at 748. Further, the court stated: "It is correct that the definition of political committee does not expressly state that the funds collected are owned by the committee." *Id.* at 750.

Although conceding that the Fair Election Practices Act did not address the issue directly, the Maryland Court of Appeals affirmed Cicoria's convictions. The court concluded that the committee's ownership of the funds was inferred from the "comprehensive scheme the Legislature constructed when it enacted the Fair Election Practices Act." *Id.* at 748.

The Maryland Court of Appeal's novel interpretation of the Fair Election Practices Act created a new crime. Prior to Cicoria's convictions in this case, no political candidate in Maryland had been charged with or convicted of theft when the funds alleged to have been stolen were those contributed to the candidate's campaign political committee.

After unsuccessful state habeas corpus challenges, Cicoria was released from supervised probation on March 25, 1999, but continues on parole until the year 2002. He filed a petition for habeas corpus with the United States District Court of Maryland, which rejected Cicoria's due process challenge, deferring to the Maryland Court of Appeals' statutory interpretation of the Fair Election Practices Act. The Fourth Circuit Court of Appeals per curiam affirmed the District Court.

REASONS FOR GRANTING THE WRIT

Prior to Cicoria's indictment, Maryland statutes and case law were silent as to who owned campaign funds. The only case that addressed this issue – *United States v. Pisani*, 773 F.2d 397 (2d Cir. 1985) – held that the silence of

a more specific New York elections statute barred a similar conviction. Yet the Maryland courts and the federal habeas courts below disregarded *Pisani* and precedents established by this Court, including *Bouie v. City of Columbia*, 378 U.S. 346 (1964), when they interpreted Maryland's Fair Election Practices Act in an unforeseeable and unsupported fashion to judicially create a new crime.

I. Due Process Mandates Reversal Of Cicoria's Convictions

A. The Maryland Fair Election Practices Act Did Not Provide Cicoria With Notice That His Conduct Was Prohibited.

Due process mandates that " . . . no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979). Yet this was precisely the result when the Maryland Court of Appeals "gleaned" from the Fair Election Practices Act's "comprehensive scheme" that Cicoria's acts were prohibited. *Cicoria v. State of Maryland*, 629 A.2d at 748. The District Court below, in deferring to the Maryland Court of Appeals, affirmed this denial of Cicoria's due process right to notice.[1]

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[1] The District Court held that Cicoria's "attack upon a state court's construction and application of its own state's laws, even if lacquered over with a constitutional glaze in the form of a due process or equal protection argument, is not cognizable by a federal court," citing *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). The District Court's reliance upon *Estelle* is misplaced and its conclusion wrong. Even courts that reject habeas petitions

Prior to Cicoria's conviction, no political candidate had been charged with or convicted of theft when the funds alleged to have been stolen were those contributed to the candidate's campaign political committee. Affirmance of his convictions is contrary to this Court's admonition that due process prevents courts from applying "a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997), citing *Marks v. United States*, 430 U.S. 188, 191-92 (1977). Just as state legislatures are barred by the ex post facto clause from enacting laws that criminalize conduct retroactively, state appellate courts are barred by the due process clause from achieving precisely the same result by judicial construction. *See Bouie v. City of Columbia*, 378 U.S. 346, 357 (1964).

In *Bouie v. City of Columbia*, this Court reversed the conviction of protesters of criminal trespass under a novel interpretation of a trespass statute affirmed by the South Carolina Supreme Court. The Court condemned the attempt to use a judicial construction to achieve an

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recognize their duty under *Bouie* to determine whether a state court violates due process by interpreting a penal statute in an "unforeseeable and unsupported fashion." *Bonillas v. Hill*, 134 F.3d 1414, 1417 (9th Cir. 1999).

Moreover, Cicoria can find no cases other than *Bonillas* extending *Estelle* beyond the context of jury instructions or evidentiary rulings that were incorrect under state law. Even in those contexts, federal habeas courts acknowledge that they can consider whether the challenged instruction or evidentiary ruling "by itself so infected the entire trial that the resulting conviction violates due process." *Estelle*, 502 U.S. at 72; *Byrd v. Collins*, 209 F.3d 486, 527 (6th Cir. 2000).

"ex post facto effect" and concluded that such an extension of a criminal statute violated *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76 (1820). *Id.* at 362. *See also Crandon v. United States*, 494 U.S. 152, 158 (1990) ("legislatures, not courts, define criminal liability").

The *Bouie* court concluded:

> We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of ex post facto laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal . . . in the last analysis the case is controlled, we think, by the principle which Chief Justice Marshall stated for the Court in *United States v. Wiltberger*, 5 Wheat. 76, 96 [5 L.Ed. 37]:
>
> > "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the

> intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, because it is of equal atrocity, or of kindred character, with those which are enumerated . . . "
>
> The crime for which these petitioners stand convicted was "not enumerated in the statute" at the time of their conduct. It follows that they have been deprived of liberty and property without due process of law in contravention of the Fourteenth Amendment.

378 U.S. at 362-63.

The Maryland courts' interpretation of the Fair Election Practices Act and the Theft Statute to criminalize Cicoria's use of campaign funds violated the *Bouie* principle by judicially creating a new crime. Cicoria was convicted of crimes "not enumerated in the statute," and not previously considered by a Maryland court.

Contrary to the District Court's holding, the Maryland courts' decision was not a "routine application" of state law. The Maryland courts did not reference a single prior judicial precedent on the issue of ownership of campaign funds, save *Pisani*, which reached the opposite conclusion. Instead, they reached their conclusion through an inference from the overall legislative scheme, involving numerous pages of analysis. The necessity to resort to such detailed analysis is precisely the lack of notice of prohibited criminal conduct that violates due process.

B. The Maryland Fair Election Practices Act Is Vague And Ambiguous And The Rule Of Lenity Mandates Interpretation In Favor Of Cicoria.

The Maryland courts' reversion to an analysis of the overall statutory scheme of the Fair Election Practices Act is a concession that at best, the statute itself was ambiguous, triggering application of the Rule of Lenity. The Maryland and federal courts' failure to apply the Rule of Lenity supports issuance of a writ here.

The Rule of Lenity directs courts to resolve ambiguities in criminal statutes in favor of defendants. *United States v. Lanier*, 520 U.S. 259 (1997). The rationale underlying the Rule of Lenity is that the judiciary should not criminalize behavior that the legislature may not have intended to prohibit. As Chief Justice Marshall wrote in 1820, "where there is no ambiguity in the words, there is no room for construction," *Wiltberger*, 18 U.S. at 95-96. The final and most general principle enunciated in *Wiltberger* – that criminal statutes normally should be construed strictly – can be traced back to Heydon's Case, 76 Eng.Rep. 637 (1584), in which Chief Justice Coke referred to the principle to limit the reach of a broad statute.[2]

In *Wiltberger*, Chief Justice Marshall held that

> the rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals . . . To

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[2] For a discussion of the historical development of this canon, *see* Max Radin, *A Short Way With Statutes*, 56 Harv.L.Rev. 388, 389 (1942).

> determine that a case is within the intention of the statute, its language must authorize us to say so.

18 U.S. at 95-96. *See also Moskal v. United States*, 498 U.S. 103, 132 (1990) ("The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted.") (Scalia, J., dissenting).

Since *Wiltberger*, this Court has repeatedly affirmed application of the Rule of Lenity. *See, e.g., United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[Rule of lenity] ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."); *United States v. Bass*, 404 U.S. 336, 347-48 (1971) ("The [rule of lenity] is founded on two policies that have long been part of our tradition. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"); *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) ("The law is settled that 'penal statutes are to be strictly construed.' ") (citations omitted).

The vagueness of Maryland's Fair Election Practices Act was well-recognized prior to Cicoria's convictions. In 1987, the *Report of the Governor's Commission to Review the Election Laws* (January 15, 1987) ("The Nilson Report") described the Maryland Fair Election Practices Act as "very ambiguous." In addition, a Comment in the Maryland Law Review described the Election Code as a thirty-

year-old accumulation of statutes "outdated by the campaign practices and technologies of the 1980's . . . [and in need of] a thorough statutory overhaul in response to Maryland's evolving political system." Comment, 48 Md. Law Review 524 (1988).

It is the vagueness of the statute that forced the court to rely on the overall statutory scheme of the Fair Election Practices Act.[3] The Maryland courts should have instead applied the Rule of Lenity in favor of Cicoria, and reversed his convictions.

II. The Decision Below Conflicts With The Second Circuit's Decision In *Pisani*

Cicoria's convictions for theft and conspiracy to commit theft conflict with the Second Circuit decision, *United States v. Pisani*, 773 F.2d 397 (2d Cir. 1985). In *Pisani*, the defendant, a former New York state senator, challenged his conviction of mail fraud based on his use of campaign funds for personal purposes. In his appeal, the defendant contended that because New York law did not prohibit the use of campaign funds for personal purposes, there was no "fraudulent scheme" as defined by the mail fraud statute.

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[3] The Maryland courts' reliance on the "overall scheme" of the statute arguably is akin to reliance on legislative history. Justice Scalia often has warned against such reliance. *See Conroy v. Aniskoff*, 507 U.S. 511, 518 (1993) (Scalia, J. concurring) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.").

The *Pisani* court recognized that "at the heart of this issue lies the question of whether New York law required Pisani to use moneys contributed to his campaign fund solely for campaign purposes, and prohibited him from putting them to personal use." *Pisani* at 407. The *Pisani* court reversed the conviction because New York state elections law was silent on this issue:

> It seems clear that no provision of New York law in effect prior to this indictment prohibited a candidate from using campaign funds for personal purposes. Certainly there was no express provision on the subject in the New York statutes . . .

Id. at 409.

Pisani is entirely on point.[4] Like the *Pisani* defendant, Cicoria was convicted for theft where the underlying basis for the theft, the elections law, was silent on ownership of campaign funds. The Second Circuit reversed, while here the Fourth Circuit affirmed, thus creating a conflict.

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[4] Neither of the federal habeas courts below addressed *Pisani*. The Maryland Court of Appeals found *Pisani* "inapposite," *Cicoria*, 629 A.2d at 752, even though it had earlier conceded, as did the *Pisani* court of the New York statute, that Maryland elections law was silent on "the issue critical to resolution of the case." *Id.* at 748. The Maryland Court of Special Appeals did address *Pisani*, noting that "Maryland's laws are not as specific as New York laws on this particular point," *Cicoria*, 598 A.2d at 777. It then, however, spent some ten pages of its opinion analyzing the Fair Election Practices Act to justify the conclusion that some entity other than the candidate actually owned the campaign contributions.

CONCLUSION

Cicoria urges the Court to review this case. To permit Cicoria's convictions for theft and conspiracy to commit theft to stand violates one of the most fundamental due process rights of a criminal defendant – the right to prior notice that certain behavior constitutes a crime.

Respectfully submitted,

JAMES K. GREEN, ESQ.
JAMES K. GREEN, P.A.
One Clearlake Centre, Suite 1602
250 Australian Avenue South
West Palm Beach, Florida 33401
Telephone: (561) 659-2029
Facsimile: (561) 655-1357

Counsel for Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-7688

ANTHONY CICORIA,

Petitioner - Appellant,

versus

PATRICIA K. CUSHWA, Chairperson,
Maryland Parole Commission,

Respondent - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Frederic N. Smalkin, District Judge. (CA-99-2364-S)

Submitted: March 23, 2000 Decided: March 30, 2000

Before LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

James K. Green, West Palm Beach, Florida, for Appellant. John Joseph Curran, Jr., Attorney General, Rachel Marblestone Kamins, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Anthony Cicoria seeks to appeal the district court's order denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 1999). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. *See Cicoria v. Cushwa*, No. CA-99-2364-S (D. Md. Nov. 17, 1999).* We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional proeess.

DISMISSED

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* Although the district court's order is marked as "filed" on November 16, 1999, the district court's records show that it was entered on the docket sheet on November 17, 1999. Pursuant to Rules 58 and 79(a) of the Federal Rules of Civil Procedure, it is the date the order was entered on the docket sheet that we take as the effective date of the district court's decision. *See Wilson v. Murray*, 806 F.2d 1232, 1234-35 (4th Cir. 1986).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 21, 2000

No. 99-7688
CA-99-2364-S

Cicoria v. Cushwa

MANDATE

The judgment of this Court dated 3/30/00 takes effect today.

PATRICIA S. CONNOR
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY CICORIA	*	
	*	Civil No. S 99-2364
v.	*	
PATRICIA K. CUSHWA, ETC.	*	

****

ORDER

Upon consideration of the petitioner's Motion to Issue Certificate of Appealability, the same is hereby DENIED, as the Court finds no substantial showing of the denial of a Constitutional right, for the reasons stated in its opinion on the merits. There is no close question or unsettled point of law, especially as to the first issue in the petition, which is the one as to which a Certificate of Appealability is particularly sought, as the law is settled that state courts' constructions of state statutes raise no federal issue, with exceptions so rare – and not apt here – as to be almost sui generis

SO ORDERED, this 14th day of December, 1999.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY CICORIA	*	
	*	Civil No. S 99-2364
v.	*	
PATRICIA K. CUSHWA	*	

****

MEMORANDUM OPINION

This is a federal habeas corpus petition (petitioner's first attacking his conviction on the merits, an earlier petition being limited to bail issues), by which the petitioner, convicted of theft and conspiracy to commit theft over nine years ago (but still sufficiently "in custody" to have standing to seek habeas relief, owing to his parole, *see Jones v. Cunningham*, 371 U.S. 236 (1963), a prior probation having been revoked and a subsequent violation-of-probation sentence having been commuted by then-Governor Schefer), challenges the constitutionality of the convictions. The respondent has answered, admitting exhaustion. No oral hearing or written expansion of the already voluminous record supplied by both parties is needed.

The pertinent facts are stated in the opinion of the Court of Appeals of Maryland affirming petitioner's conviction on direct appeal, *Cicoria v. State*, 332 Md. 21 (1993), *affirming Cicoria v. State*, 89 Md. App. 403 (1991), and do not need to be fully repeated here. It suffices to say that the defendant, an incumbent candidate for reelection to the County Council for Prince George's County, was convicted of theft and conspiracy to steal (and given concurrent sentences) for having stolen,

through a number of means, money from an authorized campaign political committee, *viz.*, Citizens for Cicoria. The long and the short of the case against Cicoria is that he took over $60,000 in money contributed to the committee and used if for various improper purposes.

Here, as was the case before the Court of Appeals, petitioner's primary attack on his convictions is that, in that the alleged victim of the theft was no more than his *alter ego*, he could not be convicted of theft, because one cannot be convicted of stealing from one's self. The Court of Appeals, construing the Maryland theft statute, MD CODE ANN. Art. 27, section 342, in light of the Maryland Fair Election Practices Act, CODE, art. 33, concluded that Cicoria was not personally the owner of the funds, but that they belonged to the committee within the meaning of the theft statute, and that the theft statute was applicable to petitioner's conduct and not preempted by criminal provisions of the Fair Election Practices Act. 332 Md. at 30-44.

It is well-settled that an attack upon a state court's construction and application of its own state's laws, even if lacquered-over with a constitutional glaze in the form of a due process or equal protection argument, is not cognizable by a federal habeas court. *See, e.g., Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Here, the Court of Appeals of Maryland simply engaged in a routine judicial act of statutory construction and resolved the issue not to petitioner's liking. That the resolution went against petitioner does not turn this state-law matter into a federal issue under *Estelle* and a legion of like cases.

The Court has considered, but rejects, petitioner's reliance on the case of *Bouie v. City of Columbia*, 378 U.S. 347 (1964). In that case, civil rights protesters were convicted under a statute that provided, in terms, that is was unlawful to go upon the lands of another after having received notice not to do so. They were given no notice not to go upon the premises in question, but simply refused the landowner's request to leave. The state court interpreted the statute to cover that conduct as well, even though the statute said nothing about remaining on land after having been told to leave. Not surprisingly, the Supreme Court held that such a construction of the statue [sic] – putting in words the Legislature never enacted – violated the due process clause for not giving fair warning, as well as the *ex post facto* clause.

The present case is nowhere near the situation presented in *Bouie*. The Court of Appeals of Maryland did not read any non-enacted words into the theft statute, but simply answered the question of law as to who is an "owner" within the meaning of the statute. This routine application of state law does not raise federal constitutional concerns. It is perfectly foreseeable to a reasonable person – laying aside the technicalities argued to the Court of Appeals and repeated in the present petition – that a state court would construe a theft statute like Maryland's to cover misapplication and misappropriation of campaign contributions made to an entity such as a campaign committee. As well, common sense supports the idea that the candidate and the committee are not fungible. The petitioner's first contention is simply devoid of merit.

The petitioner's second contention is that the performance of his trial counsel was defective, in a number of particulars. The specifications of petitioner's dissatisfaction, in the Sixth Amendment sense, with his counsel's performance, were aired in a hotly-contested three day hearing on postconviction held before Judge Darlene Perry in April of 1997. (resp. Ex. 13). Judge Perry issued her opinion on postconviction on November 7, 1997, denying relief to petitioner on his Sixth Amendment claims, holding that no prejudice was shown to have resulted from the various alleged shortcomings of his trial counsel. Judge Perry's finding of lack of prejudice was summed up by her reference to the overwhelmingly conclusive evidence of petitioner's guilt, in light of which, even had counsel done things differently as it was claimed he should have, the outcome of the trial would have been the same. (Resp. Ex. 14). The Court of Special Appeals, denying leave to appeal, agreed. (Resp. Ex. 17, at 2).

This Court has considered the specifications of unreasonable conduct set forth in the present petition, at paragraph 38, in light of the voluminous record it was furnished both before and after the respondent answered, and it finds that the state courts' application of the United States Constitution to this case, that is, its application of the Sixth Amendment as construed by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), was not contrary to established federal law, nor did it result in an unreasonable application thereof. 28 U.S.C. section 2254(d), as amended.

The Fourth Circuit has recently ruled that the district courts on habeas are not to make fully independent

reviews of *Strickland* claims where the state courts, even if they have not expounded at length on the issues, have considered those claims on the merits and rejected them; rather, the district court is to apply the criteria of section 2254(d), as this Court has done. *Graham v. Angelone*, 1999 WL 710385 (4th Cir. Sept. 13, 1999), slip op. at 13 (state's highest court had found "no merit" in Sixth Amendment claim).

Accordingly, this Court has determined that no relief is warranted on petitioner's second contention. In so determining, this Court has taken into account the Supreme Court's instruction, in *Strickland*, 466 U.S. at 697, that a determination of "no prejudice" may properly be made without giving detailed consideration to the level of counsel's performance. This Court has also, in determining that the state courts' resolution of the issue accords with section 2254(d), taken into consideration the 11 separate faults assigned to trial counsel on pages 10 and 11 of the present petition. The vast majority of them, in light of the record, are plainly such that, had counsel done things differently, there is no reasonable probability, *i.e.*, "a probability sufficient to undermine confidence in the outcome," *id.* at 694 of an acquittal, in light of the totality of the evidence.

The only specification that deserves specific discussion is the petitioner's lead contention, *viz.*, that counsel should have asserted a "good faith claim or right defense or honest belief/mistaken belief defense" . . . which, it is said, "was particularly germane given the absence of any definitive provisions in the Theft Statute or the Federal [sic] Election Statute which would have provided reasonable notice of a criminal prosecution." Given the nature

of the schemes in which the evidence showed Mr. Cicoria to have engaged, as most aptly described by the Court of Special Appeals in its opinion at 90 Md.App. at 406, it is perfectly evident to this Court that the Maryland post-conviction courts did not breach the standard applicable under section 2254(d) by finding a lack of prejudice. The Court has taken into account, in this regard, a discussion by the Court of Appeals in its opinion affirming the conviction, 332 Md. At 40, which indicates that a good faith defense could not have availed the petitioner here, given the fact that, no matter how one reads the Election laws, money contributed to the candidate must, at the very least, pass through the campaign treasurer. In short, the evidence of Mr. Cicoria's guilt was overwhelming to the point that there is no probability sufficient to undermine confidence in the outcome generated by this – and his other – *Strickland* contentions.

To the extent that petitioner complains of the state courts' procedural handling of his postconviction proceedings, those claims are, of course, not cognizable on federal habeas corpus review, *Bryant v. Maryland*, 848 F.2d 492 (4th Cir. 1988), and the Court finds those contentions provide no grounds for impugning the state courts' resolution of the issues under section 2254, as amended.

For the stated reasons, an order will be entered separately, denying relief on the present petition, on the merits.

Dated: November 16th, 1999

/s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY CICORIA	*	
	*	Civil No. S 99-2364
v.	*	
PATRICIA K. CUSHWA	*	

****

ORDER

For the reasons stated in a Memorandum Opinion of even date herewith, it is, by the Court, this 16th day of November, 1999, ORDERED:

1. That the present petition for federal habeas corpus relief BE, and it hereby IS, DENIED, on the merits; and

2. That the Clerk mail copies hereof and of the said Opinion to counsel.

/s/ Frederic N. Smalkin
Frederic N. Smalkin
U.S. District Judge

Anthony CICORIA

v.

STATE of Maryland.

No. 159, Sept. Term, 1991.

Court of Appeals of Maryland.

Aug. 27, 1993.

William C. Brennan, Jr. (Knight, Manzi, Brennan, Ostrom & Ham, on brief), Upper Marlboro, for petitioner.

Gary E. Bair, Asst. Atty. Gen. (J. Joseph Curran, Jr. Atty. Gen., on brief), Baltimore, for respondent.

Argued before MURPHY, C.J., and ELDRIDGE, RODOWSKY, McAULIFFE, CHASANOW, KARWACKI and ROBERT M. BELL, JJ.

ROBERT M. BELL, Judge.

We granted certiorari to decide whether, under the Maryland Theft Statute, Maryland Code (1957, 1992 Repl. Vol.) Art. 27, §§ 340 et seq., a candidate for public office may be convicted of theft and conspiracy to commit theft when the funds alleged to have been stolen and which are the subject of the conspiracy, are those contributed to the candidate's campaign political committee. When the Court of Special Appeals considered the issue, it answered in the affirmative. *Cicoria v. State*, 89 Md.App. 403, 598 A.2d 771 (1991). We shall do likewise.

I.

Anthony Cicoria ("Cicoria"), the petitioner, was a county councilman representing the Second District of

Prince George's County. His candidacy was promoted by an authorized campaign political committee, Citizens for Cicoria ("CFC"). *See* Maryland Code (1957, 1990 Repl. Vol.) Art. 33, § 1-1(a)(1).[1] CFC was also a continuing campaign political committee. *See* 63 Op. Att'y Gen. 273, 274-77 (1978).

Cicoria and his wife, Catherine, were indicted in March, 1990. As relevant to the case sub judice, the indictment alleged that the Cicorias[2] stole and conspired to steal, more than $64,000 from CFC.[3] He was tried and convicted by a jury in the Circuit Court for Prince George's County and sentenced to concurrent ten years terms of imprisonment, all but five years suspended, in lieu of, upon release, five years probation and restitution.

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[1] Section 1-1(a)(1) provides:

> "Authorized candidate campaign committee" means a political committee established under § 26-4 of this article and authorized by a candidate to promote his candidacy.

[2] His wife left the jurisdiction prior to the scheduled trial date. She has since returned and pled guilty to one count each of felony theft and perjury. She was sentenced to five years imprisonment, all but 140 days of which were suspended in favor of five years probation and restitution.

[3] Cicoria was also charged with, and convicted of, perjury, failure to file a complete campaign report, and tax evasion. The propriety of those charges and convictions is not before us.

Cicoria and his wife previously had been indicted, in 1989, for theft, conspiracy to commit theft, perjury, failure to complete a campaign report and tax evasion. Those charges were either dismissed by the circuit court or nolle prossed by the State Prosecutor.

The evidence adduced at trial tended to prove that, for five years, beginning in 1984, Cicoria and his wife, who became chairman of CFC in 1986, engaged in a continuing course of conduct, contrary to both the State election laws, *see* art. 33, in particular, §§ 26-1 to 26-21 (the "Fair Election Practices Act"), and the theft statute, to steal money from Cicoria's election campaign committee. In one scheme, Cicoria was reimbursed by CFC for a $2300 loan he purportedly made to the committee. Although he signed a campaign report which represented that he made such a loan, Cicoria never actually made a loan in that amount. While CFC did receive $2300, it was received in the form of small contributions by specific donors, which were never reported as such. Rather, the campaign fund reports noted a loan made to CFC, when in fact the actual campaign contributions were deposited into one of the Cicorias' personal bank accounts. At first glance, the unlisted contributions "passed" as a loan because Cicoria would then draw a check on his personal account and also make himself the payee. Cicoria would then reimburse himself for the "loan" using other campaign contributions. In addition, Cicoria was reimbursed in excess of the amount he actually loaned the campaign committee.

A second scheme Cicoria used to obtain campaign funds involved his purchase of a facility to be used for his headquarters. The evidence showed that Cicoria, his wife, and his mother purchased a unit in the Prince George's Plaza Professional Park, which he used for his headquarters. The loan documents characterized the purchase as a personal investment. Nevertheless, CFC paid more than $30,000 towards the purchase price and made some of the

mortgage payments, as well. Cicoria deducted the interest paid in respect of that purchase from his personal income taxes.

In yet another scheme, contributions to CFC were not deposited in the campaign fund account required by the Election Code. The State adduced evidence that campaign contribution checks made payable to CFC were deposited in an account maintained by Mrs. Cicoria, which, according to the custodian of records for the bank, was a joint personal account with **Anthony Cicoria**. The funds deposited in that account were required by the Fair Election Practices Act, art. 33, § 26-5, to be deposited in an account established by CFC for the deposit of campaign contributions.

Finally, testimony showed that Catherine Cicoria acting as chairperson,[4] purported to pay campaign related expenses when, in fact, "the payments" were deposited to the alleged personal accounts of the Cicorias designated as "C. Cicoria" and "C.M. Cicoria." The campaign related expenses for which "payments" were made included, inter alia, advertising, postage, printing, and rent, which either were not incurred or for which false receipts were generated to justify the reimbursement to Cicoria.

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[4] At no time during the campaign was Catherine Cicoria treasurer or subtreasurer. There was a succession of treasurers during the life of CFC. At trial, they testified that they had minimal responsibility for filing campaign reports and minimal contact with campaign funds.

II.

Cicoria does not challenge the sufficiency of the evidence to prove the schemes in which the State alleged he and his wife engaged. Rather than arguing that he did not take campaign funds from CFC, Cicoria asserts that those counts of the indictment charging theft and conspiracy to commit theft do not charge cognizable offenses. He reasons that one cannot steal from oneself: because the campaign contributions were made for his benefit and use, unless it is alleged that he used them for a purpose inconsistent with that use and benefit, no crime has been committed. As the petitioner sees it, he either is the sole owner or a joint owner with CFC, of all campaign contributions, even those made directly to CFC. Assuming that the Fair Election Practices Act does prescribe who has an ownership interest in the campaign contributions and he is not one of the persons with such an interest, he argues that ownership is in the campaign treasurer, not CFC, as charged in the indictment. Consequently, the petitioner maintains that dismissal of those counts of the indictment charging theft and conspiracy to commit theft was required.

Finally, the petitioner argues that the Fair Election Practices Act, essentially a comprehensive disclosure scheme, prescribing penalties for violation, *see, e.g.*, art.

33, §§ 26-16(b)[5] and 26-20,[6] precludes his prosecution under the theft statute. The petitioner finds support for this argument not only in the comprehensiveness of that portion of the Election Code, but in its ambiguity, as well. Cicoria argues:

> Thus, all responsible authorities have consistently stated that the Election Code is a reporting or disclosure statute and that it is extremely ambiguous and lacking in clarity. The legislature could never have intended to apply a very specific criminal statute (The Theft Statute) to such a legal morass.

Petitioner's Brief at 32. Cicoria finds persuasive the fact that, unlike the way perjury is treated in the Fair Election Practices Act, *see* art. 33, § 26-15,[7] theft of campaign funds is not listed as a crime. *Id.*

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[5] Art. 33, section 26-16(b) provides: (b) Penalties. – Every person who shall be guilty of any prohibited practices described in this section shall be fined not more than $1,000.00 or be imprisoned for not more than one year, or both, and shall be ineligible for any public or party office, for a period of four years from and after the time of the commission of such offense.

[6] Art. 33, section 26-20 provides:

> Any person who violates any of the provisions of this subtitle is guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned for not more than one year, or both, in the discretion of the court. If a different penalty is specifically prescribed for violation of any section in this subtitle and expressly set forth therein, the specific penalty applies and the penalty set forth in this section does not apply.

[7] Section 26-15 provides:

> Any wilfully, false, fraudulent, or misleading statement or entry made by any candidate for office,

III.

The theft statute prescribes five ways in which the crime of theft can be committed. Art. 27, § 342. Only two of them, *id.* at § 342(a)[8] and § 342(b)[9], have relevance to

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treasurer, or subtreasurer, or by any member or officer of any political committee, in any statement or account under oath required by this article, shall constitute the crime of perjury, and be punishable as such according to the laws of this State.

[8] Maryland Code (1957, 1992 Repl.Vol.) Art. 27, § 342(a) provides:

(a) Obtaining or exerting unauthorized control. – A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over the property of the owner, and:

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property, knowing such use, concealment, or abandonment probably will deprive the owner of the property.

[9] (b) Obtaining control by deception. – A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control of the property of the owner, and

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly, conceals, or abandons the property in such manner as to deprive the owner of the property; or

the case sub judice. Those sections proscribe the obtention or exertion of unauthorized control, *id.* at § 342(a), or the obtention of control by deception, *id.* at § 342(b), "over the property of the owner," with the intent to deprive the owner of the property. The ultimate use to be made of the property is not an element of the crime.

An "owner" is defined as

> [a] person, other than the offender, who has possession of or any other interest in the property involved, even though that interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

Id. at § 340(g). In addition to having possession under the theft statute, the owner must be a person. Although "person" is not a defined term under the theft statute, it is clear that the use of that term does not mean that the owner must be a natural person; for purposes of the theft statute, "person" has been interpreted expansively, as including individuals, *Kimbrough v. Giant Food, Inc.*, 26 Md.App. 640, 339 A.2d 688 (1975); corporations, *Melia v. State*, 5 Md.App. 354, 247 A.2d 554 (1968); and financial institutions. *Pearlstein v. State*, 76 Md.App. 507, 547 A.2d 645 (1988). CFC, a political committee, i.e., two or more persons formed to promote the success of Cicoria's candidacy, art. 33, § 1-1(a)(14),[10] is a "person" for

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> (3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment will probably deprive the owner of the property.

[10] Section 1-1(a)(14) defines a "political committee" as

> any combination of two or more persons appointed by a candidate or any other person or formed in any

purposes of the ownership provision of the theft statute.[11]

Article 27, section 340(f) defines "obtain" to mean, "[i]n relation to property, to bring about a transfer of interest or possession, whether to the offender or to another. . . . " One "exerts control" when he or she "tak[es], carr[ies] away, appropriat[es] to one's own use or sale, conveyance, transfer of title to, interest in, or possession of property." § 340(d). Section 340(i) defines

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> other manner which assists or attempts to assist in any manner the promotion of the success or defeat of any candidate, candidates, political party principle or proposition submitted to a vote at any election.

[11] There are a number of Maryland statutes defining "person" expansively to include entities other than natural persons. *See, e.g.*, Maryland Code (1957, 1990 Repl.Vol., 1992 Cum.Supp.) Art. 1, § 15, defining "person" as including "[a] corporation, partnership, business trust, or limited liability company." *See also* Maryland Code (1988) § 1-101(p) of the Tax-General Article, which provides:

> (p) Person. – (1) "Person" means an individual, receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind and any partnership, firm, association, corporation, or other entity.
>
> (2) "Person", unless expressly provided otherwise, does not include a governmental entity or a unit or instrumentality of a governmental entity.

Accord Maryland Code (1957, 1990 Repl.Vol., 1992 Cum.Supp.) Art. 41, § 10-801(j), Maryland Code (1992) Bus.Reg. Art. § 1-101; Maryland Code (1974, 1989 Repl.Vol., 1991 Cum.Supp.) Cts. & Jud.Proc. Art. § 3-401; Maryland Code (1957, 1990 Repl.Vol.) Art. 24, § 1-101; Maryland Code (1957, 1992 Repl.Vol.) Art. 27, § 764; Maryland (1957, 1990 Repl.Vol.) Art. 40A, § 1-201(y); Maryland Code (1957, 1991 Repl.Vol.) Art. 48B, § 1(11).

"property of another" as "real or personal property in which a person other than the offender has an interest which the offender does not have authority to defeat or impair, even though the offender himself may have an interest in the property." *See also* Art. 27, § 343(a).[12] These definitions make clear that theft can be committed by effecting a transfer in possession only. A thief may have an interest in the property taken so long as that interest is not, under the circumstances, superior to that of the possessor.

Whether or not a defendant has an interest sufficient to entitle him or her to possession of the property, and, hence, avoid a prosecution for theft, must depend upon the circumstances. In this case, those circumstances include the requirement of those provisions of the Election Code that prescribe how campaign funds are to be collected, kept and disbursed, and allocate responsibility in that regard. Whether the candidate has a right to possess campaign funds must necessarily depend upon whether there has been compliance with those provisions.

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[12] Art. 27, § 343 provides, in pertinent part:

(a)(1) It is not a defense to the offense of theft that the defendant has an interest in the property which was the subject of the theft if another person also has an interest or right of possession in the property that the defendant is not entitled to infringe.

(2) The following delineate[s] the right of possession:

(i) A joint or common owner of property does not have a right of possession of the property superior to that of any other joint or common owner of the property.

IV.

A.

As Cicoria correctly observes, no where in the Election Code, and, in particular, the Fair Election Practices Act, is the issue critical to the resolution of this case expressly addressed: who is to be considered the owner of campaign contributions? The intent may be gleaned, however, from the comprehensive scheme the Legislature constructed when it enacted the Fair Election Practices Act. The allocation of functions and duties among the various campaign personnel, thus, regulating the conduct of political campaigns, *County Council for Montgomery County, Md. v. Montgomery Ass'n, Inc.*, 274 Md. 52, 60-61, 333 A.2d 596, 600-601 (1975); *Parker v. Junior Printing Serv., Inc.*, 266 Md. 721, 726, 296 A.2d 377, 380 (1972), is most revealing. So too is the removal from the candidate's hands of sole discretion for campaign funds. *See Healy v. State*, 115 Md. 377, 382, 80 A. 1074, 1078 (1911).

The Fair Election Practices Act requires a candidate for public office to organize in at least one of two ways. "[A]s a condition precedent to qualifying as candidate, [each candidate for election to public office] shall appoint one campaign treasurer," art. 33, § 26-3(a)(1)(i), who, along with the candidate, "shall file campaign fund reports in accordance with § 26-11." *Id.* Section 26-3(a)(1)(ii) provides that if "an authorized candidate campaign committee has been established," the candidate need not appoint a campaign treasurer. An authorized candidate campaign committee, *see* n. 1, *supra*, is one "established under § 26-4 . . . and authorized by the candidate to promote his candidacy." *Id.* at § 1-1(a)(1).

As in the case of a campaign organized under section 26-3, every political campaign committee must have a treasurer. Unlike the section 26-3 situation, however, it is the committee, rather than the candidate, that appoints the treasurer.

Whether appointed by the candidate or a political campaign committee, the treasurer is only the agent of the appointing authority. This is made obvious by the definition of "treasurer." Section 1-1(a)(18) defines "treasurer" as "any person appointed by a candidate [or] political committee . . . to receive or disburse money or other things of value to promote or assist in the promotion of the success or defeat of any candidate . . . at any election." (Emphasis added). *See also* section 1-1(a)(5)(i), defining "contribution" as:

> the gift, transfer or promise of gift or transfer of money or other thing of value to any candidate, or his representative . . . to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election.

The agency relationship of the treasurer to the appointing authority is confirmed by the duties assigned to the treasurer.

Section 26-4(a) is explicit in providing that:

> [t]he treasurer shall receive, keep, and disburse all sums of money, or other valuable things, which may be collected, received, or disbursed by the committee or organization or by any of its members for any purposes for which the

committee or organization exists or acts. (emphasis added).[13]

Sections 26-6(a) and 26-7(a) are also instructive. Section 26-6(a) provides:

> (a) Contributions and expenditures to pass through treasurer. – All contributions, money or other valuable things collected, received or disbursed by any candidate or committee for any purpose, shall be paid over to and made to pass through the hands of the treasurer and, except as provided in § 26-5(c) of this article, shall be disbursed by him. It is unlawful for any candidate or any member or members of a committee, or for any member or members of a political committee, to make any expenditure, to disburse or expend money or any other valuable things, for any purposes until the money or other valuable things so disbursed or expended has passed through the hands of the treasurer.

The treasurer is required, by section 26-7(a) to:

> keep detailed, full and accurate accounts in . . . "account books" . . . of all contributions, money or valuable things received by or promised to, and of all expenditures, disbursements and promises of payment or disbursements of money or valuable things made by any committee, or any of its officers or members, or by any

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[13] Although this section addresses the duties of a treasurer for a political campaign committee, rather than of a treasurer appointed by a candidate – the duties of the latter not being specifically set out – it may be inferred that a treasurer appointed pursuant to section 26-3(a)(1)(i) also must receive and keep contributions and disburse expenditures made to or by the candidate.

person acting under its authority, or on its behalf.

The accounts must reflect not only the amount, but also the purpose for which the funds were received and/or disbursed. *Id.* Finally, the treasurer must file, on behalf of the committee, *see* § 26-11(b), reports or statements of contributions and expenditures. § 26-11(a). In the case of a political campaign committee, including an authorized campaign committee, the statement must be filed jointly and severally with the chairman of the committee.[14] § 26-11(b).

Section 26-5(b) requires a political committee to designate a campaign depository or depositories and to deposit therein, after receipt, "contributions in furtherance of a candidacy [or the] political committee." The deposit must be made by the treasurer or a subtreasurer appointed by the treasurer. *See* § 26-5(a).

The foregoing demonstrates that it is CFC, rather than the candidate, that has the requisite "possession . . . or . . . other interest in the property involved. . . ." *See* Art. 27, § 340(g). There are even more cogent reasons why the candidate does not have such an interest.

Although a candidate must appoint a treasurer, he or she "may not designate himself [or herself] as his own treasurer, or subtreasurer." Art. 33, § 26-3(c). Moreover, even the contributions and loans of a candidate or his or her spouse to the candidate's campaign, while not subject to the limitation on amount prescribed by section

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[14] Pursuant to section 26-4(a), the committee must appoint a chairman, in addition to the treasurer.

26-9(d),[15] "must pass through the hands of the candidate's treasurer and be reported as required in other provisions in this subtitle." *Id.* at § 26-8(a). Finally, section 26-7(d) provides:

> (d) Disposition of surplus funds. – Prior to the time of filing the final report required by § 26-11 of this article, any surplus funds remaining after payment of all campaign expenditures shall be:
>
> (1) Returned, pro rata, to the contributors by the treasurer;
>
> (2) Paid to the State central committee of the party of which the candidate is a member or for which the political committee is acting;
>
> (3) Paid to a central committee of the party of which the candidate is a member or for which the political committee is acting so long as the central committee is located in a county in which the candidate resides or seeks to represent;
>
> (4) Paid to the local board of education or to a recognized nonprofit organization providing

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[15] Section 26-9(d) provides:

> (d) Limit of contributions. – (1) Except as provided in subsections (e) and (e-1) of this section, it is unlawful for any individual, association, unincorporated association, corporation, or any other entity either directly or indirectly to contribute any money or thing of value greater than $4,000 to any candidate or political committee or to contribute money in excess of $100 except by check in any 4-year election cycle. Total contributions by a contributor under this subsection shall not exceed $10,000 in any 4-year election cycle.

services or funds for the benefit of pupils or teachers;

(5) Paid to a charitable organization registered pursuant to § 3-202 of Article 41 or to a charitable organization exempt from such registration pursuant to Article 41, § 3-203; or

(6) Paid to any public or private institution of higher education in this State that possesses a certificate of approval from the Maryland Higher Education Commission, to be used by that institution to award scholarships, grants, or loans to students attending the institution.

That this section does not permit return of funds to the candidate is telling. For purposes of the theft statute, the candidate simply does not have the requisite possessory or other interest in campaign funds to be their owner.

For its argument that the candidate has at least an equal interest in campaign funds as the political campaign committee, the petitioner focuses on the definitions of "political committee," "contributors", and "expenditures". As to the former, the petitioner notes that the "joint or common interest"[16] of a "political committee" is to provide assistance to the candidate and to support his

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[16] The petitioner finds significant the definition of "person" in Maryland Code (1985, 1993 Repl.Vol.) § 1-101(p) of the Corporations & Associations Article:

(p) Person. – "Person" includes an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

or her candidacy; it is not to own campaign funds collected by it. He finds the definitions of "contributions" and "expenditures" significant because each definition refers to "any candidate" and makes no explicit reference to a political committee. Thus, the petitioner argues that the contributions are given to the candidate, and the expenditures are made by the candidate, not the political committee. The petitioner finds support for the former argument in 70 Op. Att'y Gen. 96, 98 (1985).[17]

It is correct that the definition of political committee does not expressly state that the funds collected are owned by the committee. It does not have to, however. The Legislature recognized, as reflected in other sections of the Election Code, that to fulfill its responsibility, a political committee may have to receive, keep, and disburse campaign funds. Thus, in article 33, section 26-4(a), it is provided that the committee, through the treasurer appointed by the committee, may receive, keep, or disburse funds received by the committee for any purpose for which the committee exists. Section 26-6(a), as we have seen, also contemplates the collection, receipt or disbursement of contributions, money or other valuable things by a political committee. Similarly, section 26-7

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[17] The petitioner's reliance on 70 Op. Att'y Gen. 96, 98 (1985) is misplaced. Where a political committee is an authorized committee, it is not a novel proposition that contributions received by that committee and used for the candidate's benefit, can be deemed an indirect contribution to the candidate via the committee. That is all that opinion says, which is far from saying, or even implying, that contributions may only be made to the candidate, rather than to the political committee.

requires the committee through its treasurer, to keep books reflecting collections and expenditures by the committee. Under section 26-11, the committee, through its chairman and treasurer, is required to make reports reflecting contributions, money or other things of value received by the committee during the applicable reporting period. Moreover, it is not correct that the definitions of "contributions" and "expenditures" refer only to the candidate; rather, they refer to "any candidate, or his representative," Art. 33, § 1-1(a)(5)(i) (emphasis added), and to "any candidate, treasurer, or other agent of such candidate ". Art. 33, § 1-1(a)(7) (emphasis added). Surely, given the statutory scheme envisioned by the Legislature, an authorized political committee is the candidate's "representative" or "other agent of such candidate."

B.

In arguing that he is not guilty of theft because he cannot steal from himself, the petitioner asserts:

> [a]ny superior interest in the campaign funds above that of Mr. Cicoria has not been defeated or impaired because Mr. Cicoria is not using the funds for "unauthorized" purposes. . . . Mr. Cicoria's personal use of campaign funds affects him personally while he is campaigning for public office, therefore that use assists "in the promotion of the success or defeat" of his candidacy. . . .

Petitioner's Brief at 21 (citations omitted). He asserts, in other words, that his candidacy is promoted or assisted by any contribution or expenditures used for that purpose, however improper the method by which the funds

were obtained. The petitioner also points out that the Election Code is silent with respect to so-called "proper" uses of campaign funds.

The ultimate use of stolen funds is not an element of the type of theft alleged in the instant case, nor ought it be. A conviction for theft will, and should, lie, no matter how laudable the purpose to which the thief may put the stolen funds. That this is so is reflected in the fact that the statute addresses the manner in which control over the funds is obtained, rather than the use to which the funds are put. All that is required to constitute a violation of the theft statute, whether the conduct falls under article 27, section 342(a) or (b), is that the property be taken with the intent to deprive the owner, as defined, of the property. That a defendant may use the property in such a way as to benefit the owner of the property, or, as in this case, arguably, consistent with the purposes for which the money was raised, while relevant, certainly, to the defendant's intent, a matter of fact, does not exonerate the defendant automatically.

Article 27, § 343(c) provides:

It is a defense to the offense of theft that:

> (1) The defendant acted under a good faith claim of right to the property involved;
>
> (2) The defendant acted in the honest belief that he had the right to obtain or exert control over the property as he did;
>
> * * *

The petitioner raised no such defenses in this case. But even had he done so, they would have had to be

generated, and ultimately decided, by the jury. *See Binnie v. State*, 321 Md. 572, 580, 583 A.2d 1037, 1041 (1991); *Sibert v. State*, 301 Md. 141, 148-49, 153, 482 A.2d 483, 487-489 (1984). As we have seen, moreover, the Election Code makes clear the process and procedure by which campaign funds are to be handled. That procedure, in turn, makes crystalline that, when the entity is an authorized political campaign committee, it is the committee, through its treasurer, to whom contributions, monies or other things of value must be passed. The Election Code does not provide a mechanism for the candidate, even when the campaign is run by the candidate, or the campaign chairman to have unrestricted control of campaign funds; even in those situations, campaign funds must pass through the treasurer.

Obtaining, including by deception, and exerting unauthorized control over property of another violates sections 342(a) and (b), and, thus, is theft. Merely accepting property from the owner's agent, even when the agent has stolen it, without more, ordinarily is not. The recipient of such funds is also guilty of theft only if he or she is an aider and abettor of the theft. *CF. State v. Hawkins*, 326 Md. 270, 280-81, 604 A.2d 489, 495 (1992), *quoting State v. Ward*, 284 Md. 189, 196, 396 A.2d 1041, 1046 (1978), appeal after remand, 290 Md. 76, 427 A.2d 1008 (1981). Thus, thefts in which the treasurer is involved may create analytical problems. For example, a disbursement to the candidate of campaign funds belonging to a campaign political committee, authorized by the treasurer, would not expose the candidate to a charge of theft – the candidate's acquisition of, and exertion of control over, the funds being, in that event, authorized. A

different result would obtain, however, where the treasurer's exertion of control over the campaign funds is, itself, unauthorized and the candidate is his or her aider and abettor. In that circumstance, the candidate's guilt of theft flows from and through the treasurer. No such analytical problems are presented by this case. The petitioner's wife was prominently involved in the various schemes whereby contributions destined for CFC were diverted to the petitioner, to be sure. She was not, however, as we have seen, the treasurer of CFC, merely its chairperson.

Accordingly, the argument that the funds were not purloined because they could have been, and ultimately were used, by the petitioner, for a valid purpose is without merit.[18]

United States v. Pisani, 773 F.2d 397 (2nd Cir.1985), upon which the petitioner relies for the proposition that the ultimate use of the funds determines whether a theft conviction is appropriate is inapposite.[19] Article 33, sections 26-4 through 26-9, unlike New York's election code, designates the entity and persons with responsibility for the receipt, handling, and disbursement of campaign funds and the procedure that entity and persons must

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[18] It is far from clear that the use to which Cicoria put the funds diverted from CFC was for a valid purpose. Certainly, we do not subscribe to the view, urged by Cicoria, that any use that a candidate makes of campaign funds is valid because any purpose for which the candidate spends those funds furthers and promotes, in some sense, that candidate's campaign.

[19] The petitioner also cites *Nelson v. State*, 453 So.2d 473 (Fla.1984); *State v. Brasslett*, 451 A.2d 890 (Me.1982), neither of which provides any more support than does *Pisani*.

follow in doing so. Thus, by reference to those provisions, it can be established who has the paramount possessory, or other interest, in campaign funds. When, contrary to the prescribed procedures, campaign funds are obtained, whether by deception or without authorization, and used, with the requisite intent to deprive those persons with the paramount possessory interest in the funds, of the funds, the crime of theft occurs. It does not matter, in that event, for what purpose the funds are ultimately used.[20]

V.

The petitioner finally argues that he should not have been charged and convicted of theft; the only charges that lay, he submits, were those arising under the Election Code. He contends that, by proscribing certain conduct and providing penalties therefor, the Election Code pre-empts, thus precluding prosecution under, the theft statute. As we have seen, he is impressed by the fact that the Legislature explicitly provided, in section 26-15, that, in addition to an Election Code violation, the making of a false statement on a campaign report is perjury, but accorded no consistent treatment to theft. The petitioner also perceives the Election Code as being a reporting statute, not an ownership statute. From this, he concludes that the Legislature did not intend that conduct violative

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[20] That contributions are for the benefit of the candidate does not give the candidate unbridled discretion or control over their use, a fact that the petitioner recognizes: Cicoria obtained the funds without going through the proper channels and, with the aid of his wife, used deception to obtain them.

of a provision of the Election Code would also result in a conviction under the theft statute.

We are here concerned with two state statutes which prescribe penalties for similar and, perhaps, overlapping, prohibited conduct. We have held that such statutes must be harmonized to the fullest possible extent. *Biggus v. Ford Motor Credit Co.*, 328 Md. 188, 208, 613 A.2d 986, 998 (1992); *State v. Bricker*, 321 Md. 86, 93, 581 A.2d 9, 12 (1990); *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 511, 525 A.2d 628, 631 (1987); *Management Personnel Servs. v. Sandefur*, 300 Md. 332, 341, 478 A.2d 310, 314 (1984). To do so, we have to discern the legislative intent in enacting the statutes. In that regard, we must presume that, when it enacted the later of the two, the Legislature was aware of all other relevant enactments. *Bricker*, 321 Md. at 93, 581 A.2d at 12. Only if the legislative intent, clearly expressed, is that one supersedes, or precludes prosecution under, the other will one statute be given preemptive effect. This is consistent with the position taken by the federal courts. *See United States v. Hopkins*, 916 F.2d 207, 218 (5th Cir.1990).

In that case, the court rejected the argument that a prosecution for fraud, concealment, and misapplication of funds arising out of the violation of certain provisions of the federal election law was precluded by the federal election laws. It noted that "when an act violates more than one criminal statute, the government may prosecute under either so long as it does not discriminate against either class of defendants," *id.* at 218 (*quoting United States v. Batchelder*, 442 U.S. 114, 123-24, 99 S.Ct. 2198, 2204, 60 L.Ed.2d 755, 764 (1979)), and it does not appear that the Legislature "clearly intended that one statute

supplant another; the fact that one statute is more specific than the other is not sufficient." *Id.* at 213. The court concluded:

> There is no indication in the federal election laws that Congress intended them to supplant the general criminal statutes. . . . Moreover, the defendants in this case violated not only the election laws but also committed acts that constituted independent violations of the more general criminal statutes of Title 18. Conviction under those sections requires proof of elements not required to prove a violation of the election laws. The offenses under Title 18 thus stand wholly apart and separate from any violation of the federal election laws. The defendants' contention that they were improperly prosecuted under Title 18 is without support.

Id. at 218-219 (citation omitted).

Theft is different from the offenses proscribed by the Election Code. In addition to the conduct resulting in the defendant's control of the property, proof of theft requires the State to establish that the defendant engaged in that conduct with the intent to deprive the owner of the property. An election code violation, on the other hand, only requires proof that the defendant acted in contravention of the code; only the conduct need be shown. Thus, while the same conduct may form the basis for a charge under both the Election Code and the theft statute, it is clear that the evidence required for a conviction of theft includes at least one element that proof of the election code violation does not.

There is no indication in the Election Code that the punishment prescribed under sections 26-16 and 26-20

was intended to be exclusive or that a prosecution, for the same conduct, brought under any other statute or the common law, was intended to be precluded. Nor is there any indication in its legislative history, as the Court of Special Appeals correctly pointed out, *see Cicoria*, 89 Md.App. at 420 n. 19, 598 A.2d at 780 n. 19, that the Legislature intended that, when the same conduct could violate a statute other than the Election Code, only an Election Code violation would lie. Certainly, unlike *Forbes v. State*, 324 Md. 335, 341, 597 A.2d 427, 430 (1991), in which the legislative intent to preempt prosecution for common law involuntary manslaughter was held to be evident by the enactment of a manslaughter by automobile statute, a comparison of the theft statute with the Election Code reveals no such legislative intent.

JUDGMENT AFFIRMED, WITH COSTS.

(Cite as: 89 Md.App. 403, 598 A.2d 771)

Anthony CICORIA

v.

STATE of Maryland.

No. 1974, Sept. Term, 1990.

Court of Special Appeals of Maryland.

Nov. 29, 1991.

Certiorari Granted February 27, 1992.

William C. Brennan, Jr. (Knight, Manzi, Brennan, Ostrom & Ham, on the brief), Upper Marlboro, for appellant.

Mary Ellen Barbera, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., on the brief), Baltimore, for appellee.

Argued before MOYLAN, ALPERT and MOTZ, JJ.

ALPERT, Judge.

We are called upon to decide, inter alia, whether an office holder and candidate for political office can be convicted of stealing from "his" campaign committee's funds.

Appellant, Anthony Cicoria, appeals convictions on the following counts:[1] count I was for theft of more than

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[1] The State had previously indicted Mr. Cicoria on similar counts. The lower court dismissed some counts and the State nol prossed the others.

$300.00 from Citizens for Cicoria,[2] count II was for conspiring with his wife, Catherine Cicoria, to commit felony theft, and three counts were for tax evasion.

All the charges stemmed from Cicoria's election campaign and tenure in office as Councilman for the Second District, Prince George's County, Maryland. In short, the State alleged that Mr. and Mrs. Cicoria improperly used campaign funds for personal benefits and deposited those funds in a joint account. Those funds totalled $64,324.50. The State asserted that the Cicorias employed several schemes to steal money from Citizens for Cicoria. For example:

1) In one plot, according to the State Prosecutor, Citizens for Cicoria reimbursed Mr. Cicoria for a $2300 loan – a loan that the committee never received. In actuality, $2300 worth of contributions were not reported as discrete contributions with specific donors. Instead, the ledger listed Mr. Cicoria as giving the committee a check (loan) for $2300.

2) Mr. and Mrs. Cicoria, along with Mr. Cicoria's mother, purchased a unit (titled in their names) at the Prince George's Plaza Professional Park in December of 1986. Citizens for Cicoria paid $30,112.49 towards the unit's purchase price because Mr. Cicoria used the office as his headquarters. Yet, surprisingly, the Cicorias deducted the interest payments from their personal income taxes.

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[2] Citizens for Cicoria was a campaign committee organized to help further Mr. Cicoria's run for office.

3) Using a false expense scheme, checks for payment to CN printing were actually made out to Catherine Cicoria.

4) Campaign contributions were deposited directly into the Cicorias' joint bank account. The statutory procedure requires the treasurer of the committee to deposit funds in the committee bank account and then disburse checks for expenditures.

In addition to those theft schemes, the State contended that the Cicorias violated State tax laws because they did not report those "extra funds" on their tax returns for 1986-88.

THE PROCEEDINGS BELOW

On November 21, 1989, a Grand Jury of the Circuit Court for Prince George's County, Maryland charged appellant with four counts of theft, one count of conspiracy to commit theft, two counts of perjury, one count of failure to complete a campaign report, and three counts of tax evasion.[3] Judge Bowling of the Circuit Court for Charles County was assigned to the case because Mr. Cicoria was a sitting member of the Prince George's County Council.

Cicoria filed a Motion to Dismiss the charges against him. The circuit court, on February 16, 1990, dismissed the four theft counts and the one conspiracy count on the

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[3] The Grand Jury returned similar charges against Catherine Cicoria.

ground that the State Prosecutor exceeded his statutory authority in presenting the case to the Grand Jury.[4] In

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[4] The record does not contain a transcript of the motions hearing before Judge Bowling. We get our information from a letter to Mr. Alexander Williams, Jr., State's Attorney for Prince George's County, from Mr. Stephen Montanarelli, State Prosecutor, dated March 2, 1990. In addition, at a motions hearing on September 5, 1990, Judge Nalley discussed Judge Bowling's ruling.

THE COURT [JUDGE NALLEY]: The reason I raise it, and Mr. Touhey [Mrs. Catherine Cicoria's Counsel] might want to talk about it, but you said something slipped your mind. Page nine of Mr. Weiner's [Former Counsel for Mr. Cicoria] memo, which you are adopting, the first full paragraph, the second line of that page he says, "The most critical of the ultimate facts in the first indictment was whether the theft-related offenses were multi-jurisdictional offenses or not. That issue was resolved against the State, and that decision become [sic] final."

I attached an awful lot of significance to that assertion. It seems to me that you have one question: If indictment number one was or the charges in indictment number one were dismissed because the prosecutor didn't have authority to do something and his authority might have been lacking or Judge Bowling might have concluded that the prosecutor lacked authority, regardless of whether Alex Williams was involved or not, if he concluded as a matter of fact based on whatever was before him that the theft-related offenses were not multi-jurisdictional. Okay.

On the other hand, his conclusion might have been based on whatever was presented to him. Whether or not the offenses were mu[l]ti-jurisdictional he didn't have to reach that issue if he had been persuaded that the State Prosecutor for some other reason, such as not being solicited by a State's Attorney, had no business being involved in this kind of matter, and I just wondered if either of you wanted to talk about that.

Mr. Touhey.

MR. TOUHEY: Your Honor, your analysis just now to my belief strikes all the reason why the case should be dismissed because

addition, the court dismissed the perjury counts and the failure to file a complete campaign report charge.[5] The

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you are left in the very simple quandary of trying to be an appellate review, a second review of the decision of Judge Bowling. I mean his order is quite clear. I mean his order says that he was dismissing one through six of the first indictment, and so we are clear as to what we are talking about, one through six, as I recall, were the theft charges.

MR. NEVIN: One through five.

THE COURT: What were dismissed were the theft charges.

MR. TOUHEY: And conspiracy, common law conspiracy.

THE COURT: Theft and the conspiracy charges were related to the theft.

MR. TOUHEY: That's right. He says the State Prosecutor exceeded his statutory authority in presenting inclusive one through six to the Grand Jury. Now, I don't know what he meant by that. I don't know what the evidence before him suggested in that regard, but the issue is not for you to try and go back and figure out what was before him as to the first indictment.

THE COURT: Well, as you folks who are asking me to dismiss this set of charges based on what you say may have been before Judge Bowling, you are the moving party, isn't there a burden on you to tell me or demonstrate to me what it was that Judge Bowling was ruling?

MR. TOUHEY: No, all our burden is, Your Honor, to say Judge Bowling had before him certain facts, issues and arguments, and he made a ruling that was in the nature of a final judgment that there was a defect and that the case would be dismissed as to those counts.

[5] Mr. Cicoria alleges that the lower court dismissed the perjury counts because "the elements of the crime were not set out in sufficient detail in the indictment" and dismissed the campaign violation charge because "the charge was impermissibly vague." He provides us with no record citation for us to determine the veracity of these statements.

State nol prossed the remaining charges, thereby ending the first prosecution.

Subsequently, on March 19, 1990, the Grand Jury of the Circuit Court for Prince George's County returned a second indictment against Mr. and Mrs. Cicoria. The indictment included one count of felony theft, one count of conspiracy to commit felony theft, two counts of making false statements,[6] and three counts of tax evasion. Cicoria made a Motion to Dismiss the remaining counts of the indictment, Motion for Appropriate Relief,[7] and a Motion to Recuse Judge Nalley of the Circuit Court for Charles County. At a hearing on September 5, 1990, the court denied all of Cicoria's motions.

The court granted Cicoria a one week continuance because Mrs. Cicoria, his co-defendant, fled the jurisdiction and did not appear for trial on the scheduled date. The trial was mostly a "paper affair." Witnesses testified about bank accounts, committee ledgers, handwriting analysis, and so on. At the conclusion of the State's case, and again at the conclusion of all the evidence, Cicoria moved for Judgment of Acquittal, which motions the trial court denied. Specifically, Cicoria requested that the court strike all exhibits and testimony concerning the alleged joint bank account held by Cicoria and his wife.

After the twelve day trial, the jury convicted Cicoria of all charges. On December 12, 1990, Judge Nalley sentenced Cicoria to concurrent sentences of ten years with

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[6] The State dismissed these counts at a later date.

[7] Mr. Cicoria wanted more time to provide handwriting exemplars.

all but five years suspended and five years of probation. The court also denied Cicoria's request for bond pending appeal. Cicoria appeals to this court, raising the following issues:

> I. Does the theft statute apply to election law violations? Specifically, do Count One theft and Count Two conspiracy to commit theft properly charge offenses which would apply to candidate Cicoria?
>
> II. Did the State prosecutor have the statutory authority to bring the charges in this case?
>
> III. Did the court err by not dismissing Counts One and Two because those counts had been previously dismissed on the merits in a prior proceeding?
>
> IV. Did the court erroneously admit evidence concerning a purported joint bank account when the State did not sufficiently prove that it was a joint bank account?
>
> V. Did the State prove a willful violation of the State Income Tax Laws despite Cicoria's good faith defense?
>
> VI. Did the court err by not recusing itself at the trial of this case?

I.

Does the theft statute apply to election law violations? Specifically, do Count One theft and Count Two conspiracy to commit theft properly charge offenses which would apply to candidate Cicoria?

The Grand Jury indicted Cicoria for theft from Citizens for Cicoria – his election campaign committee. He

argues that: (1) the State cannot convict him for stealing contributions that were for his personal use – he cannot steal from himself; (2) the Election Code does not establish a legal "owner" of funds as found in article 27, § 340(g); (3) the Election Code regulatory scheme precludes the State from prosecuting him under other statutes or common law for election related offenses; and (4) assuming the Election Code does create an owner of the campaign contributions, that owner is the treasurer[8] of Citizens for Cicoria, not the entity Citizens for Cicoria.

Cicoria appears to rely on *Williams v. State*, 302 Md. 787, 490 A.2d 1277 (1985), for the proposition that "[i]t is fundamental that a court is without power to render a verdict or impose a sentence under a charging document which does not charge an offense within its jurisdiction prescribed by common law or by statute." *Id.* at 791, 490 A.2d 1277.

To understand better Cicoria's contentions, we examine article 27, § 342(a), (b) (Maryland's theft statute).

> (a) Obtaining or exerting unauthorized control. – A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and:
>
> (1) Has the purpose of depriving the owner of the property; or

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[8] Catherine Cicoria, the candidate's wife, served as the chairperson for Citizens for Cicoria (as did others) and also exercised a great deal of control over the campaign finances.

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing the use, concealment, or abandonment probably will deprive the owner of the property.

(b) Obtaining control by deception. – A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over property of the owner; and

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

Cicoria does not maintain that he did not take monies from his campaign committee, rather, he argues that Citizens for Cicoria did not own the money in its account (or contributions intended to go into its account). Therefore, to simplify the discussion, we consider who "owned" the funds at issue.[9]

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[9] Two committees of the Maryland Legislature considered amendments that, if enacted, would have simplified our present task. Under House Bill # 1387, campaign funds or property would not be considered the personal property of the candidate or the committee. H.D. 1387, 1989 Sess. (withdrawn from the Committee on Constitutional and Administrative Law). House Bill # 1480 specifically would have precluded a candidate from

A.

Section 340(g) defines the word owner.

"Owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though that interest or possession is unlawful, and

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disbursing surplus campaign funds in a manner that "personally benefits" the candidate. H.D. 1480, 1990 Sess. (unfavorable report from the Committee on Constitutional and Administrative Law).

Trying to determine what the legislature intended (or did not intend) by rejecting those bills is no easy assignment. In *Automobile Trade Ass'n v. Insurance Comm'r*, 292 Md. 15, 437 A.2d 199 (1981), the Court of Appeals stated that "the fact that a bill on a specific subject fails of passage in the General Assembly is a rather weak reed upon which to lean in ascertaining legislative intent." *Id.* at 24, 437 A.2d 199. In the present case, the bills never made it to the House floor. On that point, the Supreme Court of Illinois noted that "the failure of a committee [of the legislature] to act favorably on a proposed bill should not be relied upon, in the absence of an indication as to the reason for the failure, to ascertain legislative intent." *Maiter v. Chicago Bd. of Educ.*, 82 Ill.2d 373, 47 Ill.Dec. 721, 415 N.E.2d 1034, 1039 (Ill.1980), *cert. denied*, 451 U.S. 921, 101 S.Ct. 2000, 68 L.Ed.2d 312 (1981). Moreover, caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid. Action on a proposed amendment is not a significant aid to interpretation of an act that was passed years before. Committee reports on amendatory or supplemental legislation are not relevant for the purpose of interpreting the original legislation. 2A Sutherland, Statutes and Statutory Construction (by N.J. Singer) § 48.18 at 341 (Sands 4th ed. 1984 rev.) (footnotes omitted). Thus, we draw neither a positive nor negative inference from the Committee's materials.

> without whose consent the offender has no authority to exert control over property.

We also look to various sections of the Fair Election Practices Act for help in clarifying the issue. Md.Ann.Code art. 33, §§ 1-1-32-6 (1986 repl. vol. & supp. 1989).

First, each candidate[10] for a state public office must have either a treasurer[11] or an authorized candidate campaign committee.[12] *Id.* § 26-3. Section 26-3 states that

> each candidate for nomination for, or election to, public or party office, upon or before, and as a condition precedent to qualifying as [a] candidate, shall appoint one campaign treasurer and shall file the name and address of the treasurer

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[10] " 'Candidate' means any person who files a certificate of candidacy for any public or party office." Md.Ann.Code art. 33, § 1-1(a)(4) (Supp.1989).

[11] "Treasurer" means any person appointed by a candidate, political agent, political committee, or political party or partisan organization to receive or disburse money or other things of value to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election. *Id.* § 1-1(a)(18).

[12] " 'Authorized candidate campaign committee' means a political committee established under § 26-4 of this article and authorized by a candidate to promote his candidacy." *Id.* § 1-1(a)(1). The code also defines "political committee."

> "Political committee" means any combination of two or more persons appointed by a candidate or any other person or formed in any other manner which assists or attempts to assist in any manner the promotion of the success or defeat of any candidate, candidates, political party, principle or proposition submitted to a vote at any election.

Id. § 1-1(a)(14).

> with the board or with the State Administrative Board of Election Laws as provided in subsection (c) of this section
>
> . . . .
>
> A candidate for whom an authorized candidate campaign committee has been established is exempt from the campaign treasurer requirement of subparagraph (i) of this subsection.

In the present case, Cicoria's campaign committee was Citizens for Cicoria.

Second, the campaign committee should have a chairperson, and a treasurer who is not the candidate. *Id.* §§ 26-3(c), -4(a).

> [B]ut a candidate for a public or party office or nomination to public or party office may not designate himself as his own treasurer, or subtreasurer.
>
> *Id.* § 26-3(c).
>
> Every central committee, partisan organization, or political committee, . . . except political clubs, shall appoint and constantly maintain a chairman and a treasurer.
>
> *Id.* § 26-4(a).

Third, campaign funds must first go through the treasurer's hands.

> "Contributions" means the gift, transfer or promise of gift or transfer of money or other thing of value to any candidate, or his representative, or a representative of any political party or partisan organization to promote or assist in the promotion of the success or defeat of any

> candidate, political party, principle or proposition submitted to a vote at any election.
>
> *Id.* § 1-1(a)(5).
>
> "Expenditure" means any gift, transfer, disbursement or promise of money or valuable thing by any candidate, treasurer, or other agent of such candidate, political party or partisan organization to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election.
>
> *Id.* § 1-1(a)(7).
>
> Contributions and expenditures to pass through treasurer. – All contributions, money or other valuable things collected, received or disbursed by any candidate or committee for any purpose, shall be paid over to and made to pass through the hands of the treasurer and, except as provided in § 26-5(c)[13] of this article, shall be disbursed by him. It is unlawful for any candidate or any member or members of a committee, or for any member or members of a political committee, to make any expenditure, to disburse or expend money or any other valuable things, for any purposes until the money or other valuable things so disbursed or expended has passed through the hands of the treasurer.
>
> *Id.* § 26-6(a).

Fourth, even contributions made by the candidate or his spouse "must pass through the hands of the candidate's treasurer. . . . " *Id.* § 26-8(a).

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[13] This section deals with a petty cash fund.

> Contributions and expenses. – The contributions of a candidate or his spouse to the candidate's own campaign are not subject to the limitations of § 26-9(b),[14] but must pass through the hands of the candidate's treasurer and be reported as required in other provisions of this subtitle. Personal expenses of the candidate for filing fees, telegrams, telephoning, travel, and board, shall not be considered contributions if paid for by the candidate or his spouse.
>
> *Id.*

Fifth, the treasurer must keep the funds in a campaign depository. *Id.* § 26-5(b).

> Each candidate, political committee or central committee shall designate a campaign depository or depositories and all funds and contributions in furtherance of a candidacy, political committee or central committee shall, after receipt, be deposited by the treasurer or subtreasurer in the designated campaign depository in an account properly identifying the name of and the existence of the political candidacy, political committee or central committee. Except as provided in subsection (c),[15] a candidate, campaign treasurer or subtreasurer may not pay any expense on behalf of a candidate, directly or indirectly, and a political committee or central committee, including political clubs, may not pay any expense of such organization except by check from the designated depository.
>
> *Id.* § 26-6(b).

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[14] This section restricts the contributions and expenses of people who are not candidates.

[15] *See* supra note 13 (petty cash fund).

Sixth, the candidate and his treasurer "shall file the report or statement of contributions and expenditures" as required by the Election Code. *Id.* § 26-11 (Supp.1989).

Seventh, and lastly, § 26-7(d) dictates that surplus funds do not return to the candidate.

> (d) Disposition of surplus funds. – Prior to the time of filing the final report required by § 26-11 of this article, any surplus funds remaining after payment of all campaign expenditures shall be (1) returned, pro rata, to the contributors by the treasurer; or (2) paid to the State central committee of the party of which the candidate is a member or for which the political committee is acting; or (3) paid to a central committee of the party of which the candidate is a member or for which the political committee is acting so long as the central committee is located in a county in which the candidate resides or seeks to represent; or (4) paid to the local board of education or to a recognized nonprofit organization providing services or funds for the benefit of pupils or teachers; or (5) paid to a charitable organization registered pursuant to § 3-202 of Article 41 or to a charitable organization exempt from such registration pursuant to Article 41.

Reading these sections together, we come to several conclusions. Regarding statutory interpretation, the Court of Appeals notes that "[r]esultant conclusions are to be reasonable, logical and consistent with common sense." *State v. Bricker*, 321 Md. 86, 92, 581 A.2d 9 (1990). Cicoria was not the owner of the campaign funds in the Citizens for Cicoria bank account. Almost all campaign funds had to go through the treasurer of Citizens for

Cicoria first.[16] Even Cicoria's personal monies, once he designated them for campaign purposes, had to flow through proper channels, be spent appropriately, and be accounted for. Moreover, upon the dissolution of Citizens for Cicoria, the remaining funds do not revert to Cicoria – even personal monies that he put into the campaign fund. Second, the treasurer was not the owner of the funds, but their channeling agent. The treasurer was the steward for Citizens for Cicoria. The Election Code requires that he deposit campaign monies in a special account – Citizens for Cicoria's account. Furthermore, the treasurer could only spend the money in Citizens for Cicoria's bank account in a way that would "promote or assist in the promotion of the success or defeat of" Cicoria's candidacy. Lastly, at trial, the State presented evidence to support its position that Citizens for Cicoria owned the monies at issue in this lawsuit. Ms. Babinec, Director of Candidacy and Campaign Finance, State Administrative Board of Election Laws, testified about the ownership of campaign funds.

> Q [Mr. Nevin for the State] When a continuing committee receives contributions, whose money is it?
>
> A [Ms. Babinec] The committee's, the entity's.
>
> Q Does the money personally belong to a candidate, treasurer or chairman?
>
> A No.

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[16] Section 26-5(c) creates separate rules for petty cash expenditures.

> Q Can a candidate, treasurer or chairman do anything they want with the money?
>
> A No. Their activity is limited to campaign expenses.

Thus, all these factors point to Citizens for Cicoria as the entity which had "possession of or any other interest in the property involved. . . . " Md.Ann.Code, art. 27, § 340(g) (1987 repl. vol.). Accordingly, we reject appellant's theory that he cannot steal from himself.

There is a dearth of authority on the issue of theft by a candidate from his campaign funds. *United States v. Pisani*, 773 F.2d 397 (2d Cir.1985), is the only case we could find that bears even the slightest factual similarity to the case at bar. In Pisani, the federal government charged Pisani, a New York State Senator, with tax evasion, mail fraud, and filing false tax returns. Some of the mail fraud charges dealt with Pisani converting monies from his election campaign fund to his personal use. On appeal, Pisani argued that "his use of campaign funds for personal purposes was not unlawful. . . . " *Id.* at 407. On page 407 of the opinion, the court laid out that particular issue.

> At the heart of this issue lies the question of whether New York law required Pisani to use moneys [sic] contributed to his campaign fund solely for campaign purposes, and prohibited him from putting them to personal use. The government contends that applicable New York law did not prohibit personal use of campaign funds, and that Pisani's conceded use of some of them for personal purposes constituted embezzlement and conversion. Pisani contends, and we agree, that at the time of the events in

> question, nothing in New York law prohibited a candidate from using campaign funds for personal purposes.

Pisani used campaign funds for personal family and personal business expenses. *Id.* at 408. His campaign disclosure statements did not accurately reflect those expenditures. *Id.* Thus, his situation is similar to Mr. Cicoria's. At the time, however,

> [n]othing in this section [New York election laws] refer[red] to campaign committee funds or in any other way identifie[d] the source of the moneys [sic] from which expenditures may be made. The clear intent was to regulate what could be spent "in respect of any election[,]" and not to regulate or restrict a candidate's expenditures for nonelection purposes.

Id. at 410. After argument on Pisani's appeal, the New York legislature directly addressed the issue. New § 14-130 provides:

> Contributions received by a candidate or a political committee may be expended for any lawful purpose. Such funds shall not be converted by any person to a personal use which is unrelated to a political campaign or the holding of a public office or party position.

N.Y.Election Law § 14-130 (Consol.1986).

Maryland election laws are not as specific as New York laws on this particular point. But, Maryland law does specify that campaign contributions and expenditures are "to promote or assist in the promotion of the success or defeat of any candidate. . . . " Md.Ann.Code art. 33, § 1-1(a)(5), (7) (Supp.1989). Mr. Cicoria may not be

permitted to willfully or knowingly obtain or exert unauthorized control over property (funds) of his campaign committee, which control has the purpose of depriving the committee of that property (the funds) and the opportunity to promote the success of his candidacy. The indictment, quite appropriately, alleged that he did "steal" money "from the campaign committee known as Citizens for Cicoria."

B.

Cicoria advances the argument that the penalty provisions of the Election Code's section on Fair Election Practices are exclusive.[17] For example, § 26-20 provides that

> [a]ny person who violates any of the provisions of this subtitle is guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned for not more than one year, or both, in the discretion of the court. If a different penalty is specifically prescribed for violation of

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[17] Cicoria argues that the State is trying to "graft onto this statutory scheme a crime and a penalty. . . . " We are aware of the legislative intent behind the Fair Election Practices section. "What the legislature intended by the 'Fair Election Practices Law,' as it had with its precursor, 'The Corrupt Practices Act,' as those subtitle names suggest, was the regulation and control of campaign financing and to insure a system of centralized responsibility for campaign funds and expenditures." *Parker v. Junior Press Printing Serv., Inc.*, 266 Md. 721, 726, 296 A.2d 377 (1972). We are using the Fair Election Practices section to determine who owned the funds at issue in this case. We are not grafting the theft statute onto the Election Code.

> any section in this subtitle and expressly set forth therein, the specific penalty applies and the penalty set forth in this section does not apply.

Appellant is correct to point out that the Legislature has not provided for theft as an offense under the Election Code.[18] Cicoria, however, provides no authority to support his contentions that § 26-20 precludes the State from prosecuting him under other statutes or the common law for violations related to the elections arena. Our research of the legislative history reveals nothing that would support Cicoria's position.[19]

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[18] *See* supra note 9.

[19] *See* 1970 Md.Laws ch. 105, § 26-20; 1968 Md.Laws ch. 613, § 26-20; 1967 Md.Laws ch. 392, § 26-26; 1957 Md.Laws ch. 739, § 233; Legislative Counsel of Maryland, Reports of Legislative Committees to 1968 General Assembly; Legislative Counsel of Maryland, Reports of Legislative Committees to 1967 General Assembly; Legislative Counsel of Maryland, Reports of Legislative Committees to 1966 General Assembly; Legislative Counsel of Maryland, Reports of Legislative Committees to 1963 General Assembly; Legislative Counsel of Maryland, Reports of Legislative Committees to 1957 General Assembly. *See* also 1991 Md.Laws chs. 55, 449, 617; 1990 Md.Laws ch. 526; 1989 Md.Laws chs. 5, 288; 1988 Md.Laws chs. 598, 676; 1987 Md.Laws ch. 11; 1986 Md.Laws ch. 510; 1984 Md.Laws chs. 255, 285, 286; 1982 Md.Laws ch. 16; 1981 Md.Laws ch. 807; 1980 Md.Laws ch. 11; 1978 Md.Laws ch. 611; 1977 Md.Laws ch. 533; 1976 Md.Laws chs. 365, 378, 408, 418, 419, 582, 699; 1975 Md.Laws ch. 723; 1974 Md.Laws chs. 298, 341; 1973 Md.Laws chs. 249, 365, 779, 813; 1971 Md.Laws chs. 270, 352; 1970 Md.Laws ch. 28; 1969 Md.Laws ch. 281; 1968 Md.Laws chs. 187, 659; 1967 Md.Laws ch. 591; 1965 Md.Laws ch. 744; H.D. 1480, 1102, 488, 5, 1990 Sess.; 1548, 1390, 1389, 1387, 833, 167, 101, 95, 49, 1989 Sess.; 1394, 675, 1988 Sess.; 1118, 1117, 953, 832, 831, 40,

Looking to other jurisdictions, we find one case similar to the instant case. In *United States v. Hopkins*, 916 F.2d 207 (5th Cir.1990), the defendants circumvented the prohibition on corporate political contributions as regulated by the federal election laws. *See* 2 U.S.C. §§ 431-456 (1988). The defendants argued that the government should have prosecuted them only under the federal election laws (misdemeanor offenses), and not under Title 18 for fraud, concealment, and misapplication of funds (felonious offenses). *Hopkins*, 916 F.2d at 218. The court found their argument "meritless." *Id.* The court quoted from *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. at 2198, 60 L.Ed.2d 755 (1979). The United States Supreme Court stated that "when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against either class of defendants." *Id.* at 123-24, 99 S.Ct. at 2203-04. In addition, the court in *Hopkins* noted "[t]he only exception arises where Congress clearly intended that one statute supplant another; the fact that one statute is more specific than the other is not sufficient." *Hopkins*, 916 F.2d at 218. Furthermore, "nor does the fact that one statute prescribes a felony and the other prescribes a misdemeanor

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1987 Sess.; 1527, 1525, 1524, 1492, 819, 675, 41, 1986 Sess.; 1301, 981, 936, 1985 Sess.; 1329, 1070, 799, 92, 1984 Sess.; 1552, 1550, 1353, 750, 703, 371, 143, 1983 Sess.; 190, 1982 Sess.; 1250, 525, 292, 22, 1981 Sess.; 1569, 1980 Sess.; 1204, 609, 95; 1979 Sess.; 1894, 1893, 1612, 524, 411, 336, 265, 1978 Sess.; 96, 66, 62, 61, 1977 Sess.; H.D.J. 94, 1981 Sess.; S. 451, 1990 Sess.; 783, 748, 543, 1989 Sess.; 521, 497, 16, 1988 Sess.; 652, 650, 649, 648, 274, 99, 1987 Sess.; 953, 952, 867, 1986 Sess.; 323, 149, 30, 1985 Sess.; 383, 135, 1984 Sess.; 711, 527, 351, 1983 Sess.; 805, 410, 1980 Sess.; 851, 750, 1979 Sess.; 1152, 1128, 1978 Sess.; 259, 1977 Sess.

affect the prosecutor's authority to choose among statutes." *Id.*

> There is no indication in the federal election laws that Congress intended them to supplant the general criminal statutes. Moreover, the defendants in this case violated not only the election laws but also committed acts that constituted independent violations of the more general criminal statutes of Title 18. Conviction under those sections requires proof of elements not required to prove a violation of the election laws. The offenses under Title 18 thus stand wholly apart and separate from any violation of the federal election laws. The defendants' contention that they were improperly prosecuted under Title 18 is without support.

Id. at 218-19 (citation omitted).

Reading the Election Code, we do not find theft listed as an offense. Furthermore, comparing the Fair Election Practices sections of the Code with the theft statutes, we find the elements of theft as a crime differ from election law violations. Thus, absent any indication from the Legislature that § 26-20 precludes prosecution under other statutes or the common law, we hold that the State properly charged Mr. Cicoria with theft and conspiracy to commit theft.

Therefore, based on the discussions above, we hold that counts one and two charged cognizable offenses. *See Williams v. State*, 302 Md. 787, 791, 490 A.2d 1277 (1985).

II.

Did the State Prosecutor have the statutory authority to bring the charges in this case?

The record reflects that by letter dated March 8, 1990, Alexander Williams, Esquire, the State's Attorney for Prince George's County, requested the State Prosecutor, Stephen Montanarelli, Esquire, to proceed with the instant case. Mr. Williams took this action because, apparently, Judge Bowling dismissed the first indictment on the ground that the "State Prosecutor exceeded his statutory authority. . . . "

The State Prosecutor may proceed under article 10, § 33B(b) or (c). On the facts in this case, his power comes from § 33B(c). That section deals with multi-jurisdictional criminal activity.

> At the request of either the Governor, Attorney General, General Assembly or a State's Attorney, the State Prosecutor may investigate criminal activity conducted or committed partly in this State and partly in another jurisdiction, or which is conducted or committed in more than one political subdivision of the State.

The filing of false tax returns is a multi-county offense. *Aud v. State*, 72 Md.App. 508, 531 A.2d 706 (1987), *cert. denied*, 311 Md. 557, 536 A.2d 664 (1988).

> In *Goldberg v. State*, 315 Md. 653, 663-66, 556 A.2d 267, *cert. denied*, 493 U.S. 852, 110 S.Ct. 151, 107 L.Ed.2d 109 (1989), the Court of Appeals held that if an investigation deals with multi-county criminal activity and the proper authority empowers the prosecutor to act on the matter, then the prosecutor can appear before the

Grand Jury. If an unauthorized person appears before the Grand Jury (before it issues an indictment), the court should grant a Motion to Dismiss the Indictment. *Id.* at 660.[20] In the present case, Mr. Williams, the State's Attorney for Prince George's County, specifically requested Mr. Montanarelli, the State Prosecutor, to appear before the Grand Jury. Therefore, under the authority of *Goldberg* and article 10, § 33B(c), the State Prosecutor properly appeared before the Grand Jury.

III.

Did the court err by not dismissing Counts One and Two because those counts had been previously dismissed on the merits in a prior proceeding?

At a motions hearing on the first indictment, Judge Bowling dismissed some of the counts against Mr. Cicoria because the State Prosecutor exceeded his statutory authority.[21] Mr. Cicoria argues that the State should be bound by the principle of res judicata, and accordingly,

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[20] *Accord State v. Ensor*, 277 Md. 529, 356 A.2d 259 (1976); *Coblentz v. State*, 164 Md. 558, 166 A. 45 (1933).

[21] At the motions hearing on September 5, 1990, Mr. Touhey, counsel for Mrs. Cicoria, read into the record what Judge Bowling concluded about the State's Prosecutor's authority to appear before the Grand Jury. "The State Prosecutor exceeded his statutory authority in presenting Counts One through Six inclusive to the Grand Jury." Mr. Montanarelli's representations to Mr. Williams are in accord. "[T]he State Prosecutor exceeded his statutory authority. . . . " Letter from Stephen Montanarelli, State Prosecutor, to Alexander Williams, State's Attorney for Prince George's County, Maryland (Mar. 2, 1990).

should not have brought the second indictment against him.

"It is beyond question that the closely related doctrines of res judicata and collateral estoppel apply to criminal as well as civil causes." *Cook v. State,* 281 Md. 665, 668, 381 A.2d 671, *cert. denied,* 439 U.S. 839, 99 S.Ct. 126, 58 L.Ed.2d 136 (1978). As Judge Nalley noted at the motions hearing on September 5, 1990, the movant carries the burden of proving that the previous decision precludes the present action. *See Holloway v. State,* 14 Md.App. 703, 288 A.2d 652 (1972) (defendant did not produce sufficient evidence to support his Motion to Dismiss based on collateral estoppel).

Appellant did not furnish us with a transcript of Judge Bowling's motions hearing on the first indictment. Thus, we have no way of determining (other than the parties' assertions) the grounds Judge Bowling used to dismiss certain counts of the first indictment. Nevertheless, to avoid further litigation, we address the issue. *See* Md.Rule 8-131(a).

"There is no question but that a criminal defendant may be indicted more than once for the same offense, . . . and that any irregularity in a prior indictment may be corrected in a later indictment upon which a defendant may be tried. . . . " *Irvin v. State,* 276 Md. 168, 172, 344 A.2d 418 (1975) (citation omitted). The State, however, may not indict the defendant at will. It is bound by principles of due process.

> In Maryland the State may either appeal the dismissal of an indictment or seek a new indictment or both so long as the State's action is not

> deemed to be oppressive and thus a possible violation of due process of law. In sum, the State must act in good faith.

Irvin v. State, 23 Md.App. 457, 463, 328 A.2d 329 (1974), *aff'd*, 276 Md. 168, 344 A.2d 418 (1975). Nothing in the record suggests that the State's actions (in reindicting Mr. Cicoria) were oppressive or a violation of due process of law. Therefore, we hold that the State did not violate the *Irvin* guidelines.

IV.

Did the court erroneously admit evidence concerning a purported joint bank account when the State did not sufficiently prove that it was a joint bank account?

At trial, Judge Nalley admitted evidence concerning a bank account shared by Mr. and Mrs. Cicoria. The State proved that funds taken from Citizens for Cicoria's account (or intended for its account) were diverted and deposited into that joint bank account. Mr. Cicoria maintains that he is not listed on the account, and that the court committed reversible error by admitting evidence of the joint bank account. We disagree.

"Evidence is relevant if it tends to make a material issue in the case more probably true or untrue." *Jordan v. State*, 82 Md.App. 225, 239, 571 A.2d 238, *aff'd in part, rev'd in part*, 323 Md. 151, 591 A.2d 875 (1991). Nevertheless, the trial court may exclude evidence if its prejudicial effect substantially outweighs its probative value. *Id.* The trial judge has wide discretion when ruling on the relevance of the evidence. *Best v. State*, 79 Md.App. 241, 259, 556 A.2d 701, *cert. denied*, 317 Md. 70, 562 A.2d 718 (1989).

Ms. Mouzon, custodian of records at Sovran Bank, testified that account # 8524909 was opened in 1969. In 1977 Catherine Cicoria was the single owner of the account. But between 1977 and 1983, the bank added Mr. Cicoria's name to the account. Ms. Mouzon admitted that the bank does not have the original joint signature card with Mr. Cicoria's signature, but the bank does have an "autosig" which is a photocopy of the signature card. Both Mr. and Mrs. Cicoria's signatures appear on the autosig.

Mr. Cicoria suggests that account # 8524909 is a single account because the checks list only Mrs. Cicoria's name. Normally, both names in a joint account appear on a check, however, Ms. Mouzon pointed out that is not required. Thus, we hold that the lower court did not abuse its discretion by admitting evidence on the joint ownership status of account # 8524909.

V.

Did the State prove a willful violation of the State Income Tax Laws despite Cicoria's good faith defense?

Appellant next alleges that a subjectively reasonable good faith belief will defeat a charge of tax evasion. *Cheeks v. United States*, 498 U.S. 192, 111 S.Ct. 604, 611, 112 L.Ed.2d 617 (1991). His position is that Mrs. Cicoria "maintained the checkbook, paid the family bills, and had contact with the accountant who prepared the tax returns." Appellant argues that he "was clearly entitled to a Judgment of Acquittal. . . . " He is wrong. Assuming, arguendo, that he did present evidence supporting a "good faith" defense, it was at best a jury question. If the

jury failed to consider that defense, it was not due to judicial error, but was caused by appellant's failure to request the court to instruct the jury on the good faith defense.

Appellant goes on to argue that he was entitled to a jury instruction on his good faith defense claim. Assuming that he did make out a proper question for the jury, we look to Md.Rule 4-325(e) for guidance in this area.

> No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any plain error in the instructions, material to the rights of the defendant, despite a failure to object.

The record indicates that Mr. Cicoria did not request a good faith defense instruction, or object to the court's instructions. Therefore, he waived any possible error. Further in the exercise of our discretion, we decline to hold that the lower court committed plain error in not, sua sponte, instructing the jury on his good faith claim. *See Tull v. State*, 230 Md. 152, 186 A.2d 205 (1962) (failure to instruct properly on the matter of self-defense was not "plain error").

VI.

Did the court err by not recusing itself at the trial of this case?

Lastly, appellant argues that Judge Nalley was "biased and prejudiced against him." To support his argument, appellant points out that Judge Nalley ordered him to provide handwriting exemplars and required him to "report to a probation officer pre-trial."

Apparently, appellant relies on Canon 3(C)(1)(a) of the Code of Judicial Conduct. "A judge should not participate in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding." In *Boyd v. State*, 321 Md. 69, 86, 581 A.2d 1 (1990), the Court of Appeals favorably cited the test used by the United States Court of Appeals for the Second Circuit in *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), *cert. denied*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989), for the appearance of impropriety.

> [T]he test to be applied is an objective one which assumes that a reasonable person knows and understands all the relevant facts. [citations omitted.] We disagree with our dissenting colleague's statement that recusal based on an appearance of impropriety . . . 'requires us to judge the situation from the viewpoint of the reasonable person, and not from a purely legalistic perspective.' Like all legal issues, judges determine appearance of impropriety – not by considering what a straw poll of the only partly informed man-in-the-street would show – but

> by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all relevant facts would recuse the judge.

Our standard of review is abuse of discretion. *Boyd*, 321 Md. at 74, 581 A.2d 1. Appellant bears the burden of proof on this issue. *Carey v. State*, 43 Md.App. 246, 248-49, 405 A.2d 293 (1979), *cert. denied*, 445 U.S. 967, 100 S.Ct. 1660, 64 L.Ed.2d 244 (1980). He does not meet that burden.

First, Judge Nalley required Mr. Cicoria to report to his probation officer prior to trial. While that disturbed Mr. Cicoria, he fails to point out that Judge Nalley later rescinded that order at Mr. Cicoria's request.

Second, the judge denied Mr. Cicoria's request to postpone a handwriting analysis. Mr. Cicoria argues that the State did not timely file its request. The State attached its Automatic Discovery and Request for Discovery to the indictment against Mr. Cicoria. Section 3(h) of that form asked that the defendant "provide specimens of his handwriting." Original counsel for Mr. Cicoria, Arnold Weiner, Esquire, and Thomas Zagami, Esquire, entered their appearances on April 5, 1990. The State sent Mr. Weiner a copy of the indictment and the State's Automatic Discovery and Request for Discovery on or about March 16. Based on the timing of events, it appears that the State provided Mr. Weiner with its discovery requests well before the clock even began to run. *See* Md.Rule 4-263(e). In effect, the State supplied Mr. Cicoria with more time to respond to its request. Furthermore, the lower court attempted to schedule a handwriting session on two prior

occasions. We hold the lower court did not abuse its discretion by not recusing itself.

JUDGMENTS AFFIRMED; APPELLANT TO PAY THE COSTS.

MD Code 1957, Art. 33

§ 1-1. Definitions; computation of time.

(a) Words and phrases defined. –

As used in this article the following terms shall have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) "Authorized candidate campaign committee" means a political committee established under § 26-4 of this article and authorized by a candidate to promote his candidacy.

* * *

(4) "Candidate" means any person who files a certificate of candidacy for any public or party office. * * *

(5) "Contributions" means the gift, transfer or promise of gift or transfer of money or other thing of value to any candidate, or his representative, or a representative of any political party or partisan organization to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election.

(6) "Election" means the process by which voters of the State, or any county or city thereof, vote for any party or public officer pursuant to the laws of this State or the United States, any constitution or constitutional amendment, public law, public act or proposition and unless otherwise indicated shall include all elections, primary, general, special, local, congressional, * * *

(7) "Expenditure" means any gift, transfer, disbursement or promise of money or valuable thing by any candidate, treasurer, or other agent of such candidate, political party or partisan organization to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election.

* * *

(14) "Political committee" means any combination of two or more persons appointed by a candidate or any other person or formed in any other manner which assists or attempts to assist in any manner the promotion of the success or defeat of any candidate, candidates, political party, principle or proposition submitted to a vote at any election.

* * *

(18) "Treasurer" means any person appointed by a candidate, political agent, political committee, or political party or partisan organization to receive or disburse money or other things of value to promote or assist in the promotion of the success or defeat of any candidate, political party, principle or proposition submitted to a vote at any election.

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§ 26-3.

Appointment of treasurer, subtreasurer or campaign manager; resignation of treasurer; reports of candidate, treasurer and subtreasurer; candidate joining slate.

(a) (1) (i) Except as provided in subparagraph (ii) of this paragraph, each candidate for nomination for, or election to, public or party office, upon or before, and as a condition precedent to qualifying as candidate, shall appoint one campaign treasurer and shall file the name and address of the campaign treasurer with the board or with the State Administrative Board of Election Laws as provided in subsection (c) of this section. Every treasurer so appointed shall accept the appointment, in writing, prior to the filing of his name as treasurer. The board or the State Administrative Board of Election Laws may not accept any certificate of candidacy, either finally or conditionally, unless the name of the treasurer has previously been filed with it as provided in this subsection. The candidate and treasurer shall file campaign fund reports in accordance with § 26-11.

(ii) A candidate for whom an authorized candidate campaign committee has been established is exempt from the campaign treasurer requirement of subparagraph

(i) of this subsection.

(2) A treasurer who resigns shall do so on a form prescribed by the State Administrative Board of Election Laws signed by him, filed with the board or with the State Administrative Board of Election Laws where the

original appointment was filed. The candidate immediately shall appoint and file a new treasurer in accordance with this section.

* * *

(c) A person may not act as treasurer, subtreasurer, or campaign manager unless the form required in subsection (b) of this section is filed with the board or with the State Administrative Board of Election Laws with which the candidate is required to file his certificate of candidacy. Nothing in this subtitle shall prevent the treasurer, subtreasurer, or campaign manager of any candidate from being the treasurer, subtreasurer, or campaign manager of another candidate or political committee, but a candidate for public or party office or nomination to public or party office may not designate himself as his own treasurer, or subtreasurer or act as the campaign manager, treasurer, or subtreasurer of any other candidate or political committee. However, those candidates for party office who are members of central committees are not prohibited from being the treasurer of a central committee during their candidacy. A person may not be appointed or act as treasurer or subtreasurer or campaign manager in any election or primary election if he is not a citizen, resident, and registered voter of the State of Maryland.

(d) The treasurer of a political committee or for a candidate may appoint a separate subtreasurer for any county or political subdivision, which subtreasurer shall deposit funds, disburse and account for the same in the same manner as herein provided with respect to a treasurer. It shall be the duty of every such subtreasurer to

make a report on the form prescribed in § 26-12 of this article to the treasurer appointing him. The subtreasurer's report shall be attached to and the total amounts of contributions and expenditures contained therein incorporated into the treasurer's report prescribed in said § 26-12 of this article and filed as required by § 26-11 of this article.

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§ 26-5.

Appointment and reports of subtreasurer; campaign depositories; petty cash fund.

(a) The treasurer appointed by the central committee of any party, or the treasurer appointed in any county or City of Baltimore by the members of the central committee for such county or city of any party, or the treasurer appointed by the city committee of Baltimore City of any party, may appoint one subtreasurer for each voting precinct in the said county or city, as the case may be, which subtreasurer is authorized to expend such money as may be placed in his hands by the treasurer appointing him for such purposes as are lawful under the provisions of this article and for no other purpose, and it shall be the duty of every such subtreasurer to make a report in writing under oath to the treasurer appointing him, stating in detail the amount of money placed in his hands by the said treasurer and for what purposes the said money was expended by him and to whom paid on the form prescribed in § 26-12 of this article and in accordance with § 26-11 of this article; and it shall be the

duty of every such treasurer to file the report of every subtreasurer appointed by him along with and as a part of the account and statement required to be filed by such treasurer and to incorporate into such treasurer's report the total amount of contributions and expenditures contained in every subtreasurer's report under the provisions of §§ 26-11 and 26-12 of this article.

(b) Each candidate, political committee or central committee shall designate a campaign depository or depositories and all funds and contributions in furtherance of a candidacy, political committee or central committee shall, after receipt, be deposited by the treasurer or subtreasurer in the designated campaign depository in an account properly identifying the name of and the existence of the political candidacy, political committee or central committee. Except as provided in subsection (c), a candidate, campaign treasurer or subtreasurer may not pay any expense on behalf of a candidate, directly or indirectly, and a political committee or central committee, including political clubs, may not pay any expense of such organization except by check from the designated depository.

(c) A separate book or ledger shall be maintained for any petty cash expenditures. Expenditures from the petty cash fund shall be supported by vouchers retained by the treasurer and reported by category on the appropriate campaign fund report. The petty cash fund may not exceed $250 at any given time and the fund may be replenished only by check as provided in subsection (b) of this section. No more than $25 in the aggregate may be disbursed from the petty cash fund to any single recipient in any primary or general election. This section does not

authorize expenditures for any purpose which is unlawful under this article.

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§ 26-6. Expenditures by treasurer.

(a) Contributions and expenditures to pass through treasurer. –

All contributions, money or other valuable things collected, received or disbursed by any candidate or committee for any purpose, shall be paid over to and made to pass through the hands of the treasurer and, except as provided in § 26-5(c) of this article, shall be disbursed by him. It is unlawful for any candidate or any member or members of a committee, or for any member or members of a political committee, to make any expenditure, to disburse or expend money or any other valuable things, for any purposes until the money or other valuable things so disbursed or expended has passed through the hands of the treasurer.

(b) Presentation of statement of moneys due. –

Any statement of moneys owing by a treasurer or subtreasurer shall be presented for payment to the treasurer or subtreasurer within 30 days after the election in connection with which the liability was incurred.

(c) Treasurer of State central committee. –

The treasurer appointed and acting for or in connection with the State central committee of the State or any political party may not expend or disburse any money or valuable thing, or incur any liability whatsoever, except

by the authority and subject to the direction of the chairman of the State central committee of the State for or in connection with which the treasurer may be appointed or acting.

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§ 26-8. Contributions and expenses of candidates; loans.

(a) Contributions and expenses. –

The contributions of a candidate or his spouse to the candidate's own campaign are not subject to the limitations of § 26-9 (b), but must pass through the hands of the candidate's treasurer and be reported as required in other provisions in this subtitle. Personal expenses of the candidate for filing fees, telegrams, telephoning, travel, and board, shall not be considered contributions if paid for by the candidate or his spouse.

(b) Loans. –

(1) No loan may be made to the campaign of a candidate, or accepted on behalf of the campaign, without the express written consent of the candidate. Written consent constitutes the personal guarantee of the candidate for repayment of the loan only if it expressly so provides. A copy of the consent shall be furnished to the lender at the time of the loan and attached to the appropriate campaign fund report required by §§ 26-11 and 26-12 of this article.

(2) The terms of any loan to a candidate or political committee shall:

(i) Be in writing;

(ii) Include the lender's name, address, and signature;

(iii) State the schedule for repayment of the loan;

(iv) State the interest rate of the loan; and

(v) Be attached to the appropriate campaign fund report.

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§ 26-11.

Election reports to be filed by candidate, treasurer and committee chairman.

(a) A candidate for nomination or election to public or party office, including write-in candidates, and the treasurer designated by that candidate shall file the report or statement of contributions and expenditures as prescribed in accordance with § 26-12 of this article with the board at which the candidate filed his certificate of candidacy. All reports or statements of contributions and expenditures shall be filed in duplicate except those filed with the State Administrative Board of Election Laws. Election reports as specified below are required by all candidates for public or party office whether or not the candidate's name appears on the primary ballot, or the candidate withdraws subsequent to filing his certificate of candidacy, or the candidate is unsuccessful in the election. Each report filed shall contain all contributions received and expenditures made in furtherance of the candidate's nomination or election by the candidate himself or, with the knowledge of the candidate, by any other

person or groups of persons, which shall be complete, except as otherwise provided in this section through and including the seventh day immediately preceding the day by which that report is to be filed. The initial report filed shall contain all contributions so received and expenditures so made since the date of the last preceding election to fill the office for which he is a candidate. Each subsequent report shall contain all contributions so received and expenditures so made since the end of the period for which the last preceding report is filed. Even if no contributions or expenditures have been made since the end of the period for which the last preceding report was filed, a statement to that effect must be filed on the forms prescribed pursuant to § 26-12 of this article under the circumstances and at the times specified in this section. The initial and subsequent reports shall be consecutively filed as follows:

(1) No later than the fourth Tuesday immediately preceding any primary election; and

(2) No later than the second Friday immediately preceding any election which shall be complete through and including the preceding Sunday; and

(3) No later than the third Tuesday after the general election; and

(4) If a cash balance exists or if any unpaid bills or deficits remain to be paid as of the end of the period for which the report or statement in paragraph (3) of this subsection is filed, six months after the general election; and

(5) If a cash balance exists or if any unpaid bills or deficits remain to be paid as of the end of the period for which the report or statement in paragraph (4) of this subsection is filed, one year after the general election; and

(6) If a cash balance exists or if any unpaid bills or deficits remain to be paid as of the end of the period for which the report or statement in paragraph (5) of this subsection or any subsequent report or statement is filed, annually on the anniversary of the general election until no cash balance, unpaid bill, or deficit remains; and

(7) If a cash balance or outstanding debts or deficits were reflected on the last preceding report, but have all been eliminated by the date on which the next report is due, then a report clearly marked as "final" shall be filed on or before such date showing all transactions since the last report; and

(8) If a candidate does not intend to receive contributions or make expenditures of $300 or more, exclusive of his filing fee, he and his treasurer may jointly execute an affidavit to that effect on a form prescribed by the State Administrative Board of Election Laws. If he does not in fact receive contributions or make expenditures of $300 or more, no further reports need be filed pursuant to this section. The affidavit shall be filed not later than the date by which the first report is due. If at any time the cumulative contributions to or expenditures by a candidate who has filed such an affidavit equal or exceed $300, he and his treasurer shall thereafter file all reports required by this section and failure to do so constitutes a failure to file and the commission of a misdemeanor

subject to the penalties prescribed in § 26-20 of this article.

(b) It is the responsibility of the candidate and treasurer, jointly and severally, if it is the statement of a candidate, and the chairman and treasurer, jointly and severally, if it is the statement of a committee, to file all reports or statements in full and accurate detail.

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§ 26-15. Perjury.

Any wilfully false, fraudulent, or misleading statement or entry made by any candidate for office, treasurer, or subtreasurer, or by any member or officer of any political committee, in any statement or account under oath required by this article, shall constitute the crime of perjury, and be punish able as such according to the laws of this State.

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§ 26-16. Offenses constituting prohibited practices.

(a) Enumerated. –

The following persons shall be guilty of prohibited practices and shall be punished in accordance with the provisions of this section:

(1) Offering Bribe, etc. Every person who shall, directly or indirectly, by himself or by another, give or offer or promise to any person any money, gift, advantage, preferment, aid, emolument or any valuable thing

whatever, for the purpose of inducing or procuring any person to vote, or refrain from voting, for or against any person, or for or against any measure or proposition at any election or political convention or for or against the election of any officer by the General Assembly of Maryland.

(2) Accepting or Soliciting Bribe, etc. Every person who shall, directly or indirectly, receive, accept, request or solicit from any person, candidate, committee, association, organization or corporation, any money, gift, advantage, preferment, aid, emolument, or any valuable thing whatsoever, for the purpose of inducing or procuring any person to vote, or refrain from voting, for or against any person, or for or against any measure or proposition at any election or political convention.

(3) Acting on Bribe, etc. Every person who, in consideration of any money, gift, advantage, preferment, aid, emolument, or any valuable thing whatsoever, paid, received, accepted, or promised to the advantage of himself or any other person, shall vote or refrain from voting for or against any person, or for or against any measure at any such election or political convention.

(4) Making Contribution Other Than to Treasurer or Subtreasurer.

(i) Except as provided in subparagraph (ii) of this paragraph, every person who shall, directly or indirectly, pay, give, contribute or promise any money or other valuable thing, to defray, or towards defraying the costs or expenses of any campaign or election, to any person, committee, company, organization or association, other than to a treasurer or a subtreasurer.

(ii) Item (i) of this paragraph may not apply to:

1. Dues regularly paid for membership in any political club if all money expended by the club or in connection with the costs or expenses of any campaign or election shall be paid out by it only through a treasurer or subtreasurer as provided in this article;

2. Volunteered time or personal vehicles or personal advertising or costs and expenses incident to the expression of personal views in accordance with the provisions of § 26-9 (a) of this article; or

3. An employer's accumulation of employee contributions in accordance with § 26-9 (c) of this article.

(5) Political Contributions in False Name. Every person who shall, directly or indirectly, by himself or through another person, make a payment, or promise of payment, to a treasurer or subtreasurer, or candidate, in any other name than his own, and every treasurer or subtreasurer or candidate who shall knowingly receive a payment, or promise of payment, and enter the same or cause the same to be entered in his accounts in any other name than that of the person by whom such payment or promise of payment is made.

(6) Coercing Employees. Every person who, being an employer, pays his employees the salary or wages due in "pay envelopes," upon which there is written or printed or in which there is enclosed any political motto, device or argument containing threats, express or implied, intended or calculated to influence the political opinions or actions of such employees, or within ninety days of an election puts, or otherwise exhibits in the

establishment or place where his employees are engaged in labor, any handbill or placard containing any threat, notice or information that if any particular ticket or candidate is elected or defeated, work in his place or establishment, will cease, in whole or in part, his establishment be closed up or the wages of his employees reduced, or other threats, express or implied, intended or calculated to influence the political opinions or actions of his employees.

(7) Campaign Literature. Every person who publishes or distributes or causes to be published or distributed any pamphlet, circular, card, sample ballot, dodger, poster, advertisement or any printed, multigraphed, photographed, typewritten or written matter or statement or any matter or statement which may be copied by any device or method now known for printing or copying or which may hereafter be used for making copies or printed or written matter in any form whatever for publication or distribution, relating to or concerning any candidate, including a write-in candidate, or prospective candidate for public or party office or for the acceptance or defeat of any proposition unless such pamphlet, circular, card, sample ballot, dodger, poster, advertisement, or other form of publication herein described clearly indicates the name of the candidate or committee responsible for the literature and contains, but set apart therefrom, an authority line which shall include the name and address of the person, treasurer, or campaign manager responsible for the publication or distribution of the same, except that if the person, treasurer, or campaign manager has furnished his address to the appropriate board the literature need not contain an address.

(8) Contribution or Expenditure in Violation of § 26-8. Every person who, being a candidate, makes any payment, contribution, expenditure or promotes or incurs any liability to pay, contribute or expend from his own personal financial resources any money or thing in value in a manner not authorized by § 26-8 of this Article.

(b) Penalties. –

Every person who shall be guilty of any prohibited practices described in this section shall be fined not more than $1,000 or be imprisoned for not more than one year, or both, and shall be ineligible for any public or party office, for the period of four years from and after the time of the commission of such offense.

(c) Prosecution; immunity of witnesses. –

It shall be the duty of the State's Attorney of Baltimore City and of the State's Attorney of each county of this State to prosecute, by the regular course of criminal procedure, any person whom he may believe to be guilty of having wilfully violated any of the provisions of this section within the city or county for which said State's Attorney may be acting as such. In any criminal prosecution under this subtitle or for violation of any of the provisions thereof, no witness, except the person who is accused and on trial, shall be excused from answering any question or producing any book, paper or other thing on the ground or claim that his answer, or the thing produced or to be produced, by him may tend to incriminate or degrade him, or render him liable to a penalty, provided that any person answering such a question or so producing a thing shall be exempt from prosecution, trial and punishment for any offense of which that person

may have been guilty or a participant therein, and about which he gives such an answer or so produces a thing, except in a prosecution for perjury in so testifying.

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§ 26-20. Penalty for violations.

Any person who violates any of the provisions of this subtitle is guilty of a misdemeanor, and upon conviction shall be fined not more than one thousand dollars ($1,000.00), or be imprisoned for not more than one year, or both, in the discretion of the court. If a different penalty is specifically prescribed for violation of any section in this subtitle and expressly set forth therein, the specific penalty applies and the penalty set forth in this section does not apply.

MD Code 1957, Art. 27

§ 340. Definitions.

In this subheading, the following words have the meanings indicated.

* * *

(c) "Deprive" means to withhold property of another:

(1) Permanently; or

(2) For such a period as to appropriate a portion of its value; or

(3) With the purpose to restore it only upon payment of reward or other compensation; or

(4) To dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

(d) "Exerts control" includes but is not limited to the taking, carrying away, appropriating to one's own use or sale, conveyance, transfer of title to, interest in, or possession of property. The term "exerts control" does not include trespassing on the land of another or occupying without a authorization the land of another.

(e) "Knowingly" –

A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is practically certain that the result will be caused by his conduct. When knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is practically certain of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(f) "Obtain" means:

(1) In relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(2) In relation to services, to secure the performance thereof.

(g) "Owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though that interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

(h) "Property" means anything of value, including but not limited to:

(1) Real estate;

(2) Money;

(3) Commercial instruments;

(4) Admission or transportation tickets;

(5) Written instruments representing or embodying rights concerning anything of value, or services, or anything otherwise of value to the owner;

(6) Things growing on or affixed to, or found on land, or part of or affixed to any building;

(7) Electricity, gas, and water;

(8) Birds, animals, and fish which ordinarily are kept in a state of confinement;

(9) Food and drink;

(10) Samples, cultures, micro-organisms, specimens;

(11) Records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes or models thereof; or any other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes,

or models thereof which represent evidence, reflect or record secret scientific, technical, merchandising production or management information, designed process, procedure, formula, invention, trade secret, or improvement;

(12) Financial instruments, information, electronically produced data, computer software and programs in either machine or human readable form, and other tangible or intangible items of value.

(i) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender does not have authority to defeat or impair, even though the offender himself may have an interest in the property.

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§ 342. Theft.

(a) Obtaining or exerting unauthorized control. –

A person commits the offense of theft when he willfully or knowingly obtains control which is unauthorized or exerts control which is unauthorized over property of the owner, and:

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(c) Possession of stolen property. –

A person commits the offense of theft when he willfully or knowingly uses deception to obtain and does obtain control over property of the owner, and;

(1) Has the purpose of depriving the owner of the property; or

(2) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(3) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(c) Possession of stolen property. –

(1) A person commits the offense of theft if he possesses stolen personal property knowing that it has been stolen, or believing that it has probably been stolen, and:

(i) Has the purpose of depriving the owner of the property; or

(ii) Willfully or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(iii) Uses, conceals, or abandons the property knowing such use, concealment, or abandonment probably will deprive the owner of the property.

(2) The requisite knowledge may be inferred in the case of a person in the business of buying or selling goods who:

(i) Is found in possession or control of property stolen from two or more persons on separate occasions; or

(ii) During the year preceding the criminal possession charged, has acquired stolen property in a separate transaction; or

(iii) Being a person in the business of buying or selling property of the sort possessed, acquired it for a consideration which he knew was far below its reasonable value.

(3) In any prosecution for theft by possession of stolen property under this section, it is not a defense that:

(i) The person who stole the property has not been convicted, apprehended, or identified; or

(ii) The defendant stole or participated in the stealing of the property; or

(iii) The stealing of the property did not occur in this State.

(4) A person who criminally possesses stolen property and a person who has stolen the property are not accomplices in theft for the purpose of any rule of evidence requiring corroboration of the testimony of an accomplice, unless the person who criminally possesses the property had participated in the stealing.

(d) Obtaining control of lost, mislaid or mistakenly delivered property. – A person commits the offense of

theft when he obtains control over property of another which he knows to have been lost or mislaid, or to have been delivered under a mistake as to the identity of the recipient or nature or amount of the property if he:

(1) Knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and

(2) Fails to take reasonable measures to restore the property to the owner; and

(3) Has the purpose of depriving the owner permanently of the use or benefit of the property either when he obtains the property, or at any later time.

(e) Obtaining services by deception. –

A person commits the offense of theft when he obtains the services of another which are available only for compensation by: (1) Deception; or

(2) Knowing that the services are provided without the consent of the person providing them.

(f) Penalty. –

(1) A person convicted of theft where the property or services that was the subject of the theft has a value of $300 or greater is guilty of a felony and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than $1,000, or be imprisoned for not more than 15 years, or be both fined and imprisoned in the discretion of the court.

(2) A person convicted of theft where the property or services that was the subject of the theft has a value of

less than $300 is guilty of a misdemeanor and shall restore the property taken to the owner or pay him the value of the property or services, and be fined not more than $500, or be imprisoned for not more than 18 months, or be both fined and imprisoned in the discretion of the court; however, all actions or prosecutions for theft where the property or services that was the subject of the theft has a value of less than $300 shall be commenced within 2 years after the commission of the offense.

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§ 343. Defenses and presumptions.

(a) (1) It is not a defense to the offense of theft that the defendant has an interest in the property which was the subject of the theft if another person also has an interest or right of possession in the property that the defendant is not entitled to infringe.

(2) The following delineate the right of possession:

(i) A joint or common owner of property does not have a right of possession of the property superior to that of any other joint or common owner of the property.

(ii) In the absence of an agreement to the contrary, a person in lawful possession of property has a right of possession superior to that of a person having only a security interest in the property, even if legal title to the property lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

(b) It is not a defense to theft that the property was taken, obtained, or withheld from a person who had obtained possession of the property by illegal means.

(c) It is a defense to the offense of theft that:

(1) The defendant acted under a good faith claim of right to the property involved;

(2) The defendant acted in the honest belief that he had the right to obtain or exert control over the property as he did;

(3) The property involved was that of the defendant's spouse, unless the defendant and the defendant's spouse were not living together as man and wife and were living in separate abodes at the time of the alleged theft; or

(4) In cases of theft of a trade secret, that the defendant rightfully knew the trade secret or that it was available to him from a source other than the owner of the trade secret.

(d) All common law and evidentiary presumptions applicable on July 1, 1979 to offenses which are consolidated under the provisions of this subheading are also applicable to the offense of theft, unless specifically repealed or modified by the provisions of this subheading, or unless modified by court decisions rendered after July 1, 1979.